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THE RESURRECTION OF HISTORIC USURY PRINCIPLES FOR CONSUMPTION LOANS IN A FEDERAL BANKING SYSTEM

John D. Skees⁺

Lisa Engelkins was a single mother working as a temporary employee, trying to raise a five-year-old without dependable child support from her daughter's father.¹ When she needed extra money to make ends meet, she went to Urgent Money Services, and after writing a check for \$60, she received \$49.41 in cash.² This soon became her regular method for paying her bills.³ She would write a check to Urgent Money Services, which the store agreed not to cash for two weeks, and in return for a \$300 check, she would immediately receive \$255—a \$45 fee for the store.⁴ This decreased her income even further, and as a result, she found herself needing these payday advance services more often.⁵ In a few years, she would use these services nineteen times, totaling more than \$1,200 in fees.⁶

⁺ J.D. Candidate, May 2007, The Catholic University of America, Columbus School of Law. The author wishes to thank Professor William J. Wagner for his invaluable guidance throughout the writing process and Professor Ralph J. Rohner for sharing his expertise on the consumer lending industry. Additionally, the author wishes to thank his wife, Sara, for her patience, support, and understanding. Finally, the author would like to express his gratitude to Father Michael J. McGivney who taught us that charity toward our neighbors is always our highest calling.

1. Caitlin Johnson, *Nickels, Dimes and Big Bucks*, CONNECT FOR KIDS, Jan. 12, 2004, <http://www.connectforkids.org/node/533>. Lisa is in many ways typical of a payday loan consumer, as the customer base for payday lending is generally made up of low-to-moderate income clientele. Creola Johnson, *Payday Loans: Shrewd Business or Predatory Lending?*, 87 MINN. L. REV. 1, 99 (2002); see also CHRISTOPHER L. PETERSON, TAMING THE SHARKS: TOWARDS A CURE FOR THE HIGH-COST CREDIT MARKET 14 (2004) (quoting a government study as finding the typical customer to be a woman making about \$24,000 a year). There is also evidence that payday lenders target those at the lower end of the income spectrum, especially welfare recipients and those on fixed incomes. Creola Johnson, *supra*, at 100-01. Payday loan borrowers are also much more likely to have filed for bankruptcy than the national average. *Id.* at 101-02 (15.4% as compared to 3.7%).

2. Caitlin Johnson, *supra* note 1.

3. *Id.*

4. *Id.*

5. *Id.*

6. *Id.* Generally the payday loan process works in the following sequence: a borrower will go to a payday lending outlet with a driver's license, a bank statement, a telephone bill, proof of employment and income, and a checkbook. Creola Johnson, *supra* note 1, at 9. After approving the customer for a loan, the lender will give anywhere from \$50 to \$1,000 to the borrower, and in return the customer gives the lender a check for that amount plus a fee, or alternatively, will require the customer to agree to an automatic

Yet payday loans, such as Lisa's, despite having a national average annual percentage rate of 470%,⁷ are legal as an unintended consequence of the National Bank Act.⁸ Congress passed this statute to prevent discrimination against national banks,⁹ and with the help of one Supreme

debit of their checking account on the day the loan is due. *Id.* at 9-10. The loan period is anywhere up to two weeks because that is roughly the length of the usual pay period. *Id.* at 10. At the end of the loan period the borrower can pay the loan "in full" and reclaim his check, pay a rollover fee, refinance the loan (e.g., basically paying a rollover fee in states prohibiting them), or the lender can try to cash the borrower's check. *Id.* Another option is for the borrower to go to another payday loan company to take out a loan to pay off the first lender, driving up the cost of the original loan even more. Lynn Drysdale & Kathleen E. Keest, *The Two-Tiered Consumer Financial Services Marketplace: The Fringe Banking System and Its Challenge to Current Thinking About the Role of Usury Laws in Today's Society*, 51 S.C. L. REV. 589, 601 (2000). Lisa's story is becoming more and more common, as more than eight million households now use payday loan services in a year. Michael S. Barr, *Banking the Poor*, 21 YALE J. ON REG. 121, 150 (2004). Overall, the industry loans about \$15 billion annually to desperate consumers. Tasha L. Winebarger, Note, *The Beginning of the End: The Demise of Bank Partnerships with Payday Lenders*, 7 N.C. BANKING INST. 317, 317 (2003). All together, pseudo-banking services aimed at lower-income individuals make a yearly profit of about \$5.45 billion. Caitlin Johnson, *supra* note 1 (including payday lending, check cashing, rent-to-own, and similar transactions). The payday loan segment of this industry is growing faster than any other. Charles A. Bruch, Comment, *Taking the Pay Out of Payday Loans: Putting an End to the Usurious and Unconscionable Interest Rates Charged by Payday Lenders*, 69 U. CIN. L. REV. 1257, 1257 (2001). Payday lending is the most egregious form of subprime lending because it has serious consequences that do not exist in other forms of subprime lending such as pawnbroking, title pawns, or rent-to-own agreements; because with those contracts, the borrower only stands to lose his pawned possession or have his rented furniture repossessed. *Id.* at 1273. However, with payday loans, the borrower is liable for the principal, the interest, and any fees; and he may also have problems if the lender tries to cash his check. *Id.*

7. Barr, *supra* note 6, at 159 tbl.1. A national average APR of 500% has been postulated by other scholars. Bruch, *supra* note 6, at 1258. This APR is exorbitant even in comparison to Mafia loansharks of the 1960s, who typically charged about 250% APR. PETERSON, *supra* note 1, at 11. Even higher rates of interest are not unheard of, as one Indiana payday lender offered a loan of \$100 with interest of \$20 per day—an APR of 7,300%. *Id.* Although the payday lending industry claims that Annual Percentage Rates are not a fair way to evaluate a short-term loan, the fact that a sizeable percentage of borrowers would roll over their loans demonstrates that these loans are often not short term at all. *Id.* at 13.

8. 12 U.S.C. § 85 (2000).

9. See *Roper v. Conserve, Inc.*, 578 F.2d 1106, 1115 n.9 (5th Cir. 1978), *aff'd sub nom.* Deposit Guar. Nat'l Bank v. Roper, 445 U.S. 326 (1980); *First Nat'l Bank in Mena v. Nowlin*, 509 F.2d 872, 880 (8th Cir. 1975); James J. White, *The Usury Trompe L'Oeil*, 51 S.C. L. REV. 445, 447 (2000). The passage of this law was closely related to the financial needs of the federal government in the midst of the Civil War. *Id.* at 450; see also CONG. GLOBE, 38th Cong., 1st Sess. 2132 (1864) (quoting Senator Chandler as supporting a national banking system because "the people of this nation . . . will stand anything and everything to sustain their Government at this hour . . . I believe it to be the duty of the Senate to insist upon [a national banking law] in this hour of peril"). This statute was effective, as it was read to preempt state law usury claims against national banks. See

Court decision, *Marquette National Bank of Minneapolis v. First of Omaha Service Corp.*,¹⁰ this law has created the legal field in which payday lenders operate effectively free of state usury limits.¹¹ This minimizes the traditional consumer protection role of the states¹² and makes payday lending ever more profitable at the expense of the poor.¹³ It is increasingly apparent that as usury limits at the state level have been effectively inoperative,¹⁴ these businesses are exploiting the financial vulnerability of their clients.¹⁵

Beneficial Nat'l Bank v. Anderson, 539 U.S. 1, 10 (2003); *Evans v. Nat'l Bank of Savannah*, 251 U.S. 108, 114 (1919); *Barnet v. Nat'l Bank*, 98 U.S. 555, 558 (1879).

10. *Marquette Nat'l Bank of Minneapolis v. First of Omaha Serv. Corp.*, 439 U.S. 299 (1978). This case involved a dispute over § 85, which permitted a national bank from one state to charge customers in other states an interest rate that would be legal in the bank's home state, but was higher than the rate allowed in the other states where the bank was soliciting customers. *Id.* at 301. A unanimous Court decided that such rate exportation was permissible under the law. *See id.* at 313-14.

11. White, *supra* note 9, at 445; *see also* Interstate Banking; Federal Interest Rate Authority, 70 Fed. Reg. 60,019, 60,026 (proposed Oct. 14, 2005) (to be codified at 12 C.F.R. pts. 331, 362) [hereinafter Federal Interest Rate Authority] (describing how *Marquette* made rate exportation possible); *see also* White, *supra* note 9, at 448 (arguing that "under the *Marquette* doctrine, the sternest state laws are the first to be undermined and the quickest to fall"); Winebarger, *supra* note 6, at 320 (stating that "[s]ection 85 . . . has emerged as an enabling statute for payday lenders"). Congress would later extend this same advantage to state banks. 12 U.S.C. § 1831d(a) (2000); White, *supra* note 9, at 453-54.

12. *See infra* Part I.B-C.

13. *See* Michael Bertics, Note, *Fixing Payday Lending: The Potential of Greater Bank Involvement*, 9 N.C. BANKING INST. 133, 136 (2005). Payday lending did not exist before the early 1990s, but by the year 2000, there were more than 10,000 payday lenders. *Id.* at 136. The industry, as a whole, profits more than \$2 billion a year in fees, making approximately fifty-five to sixty-nine million payday loans a year, quite impressive for an industry that did not exist before the first Check Into Cash payday loan store opened in Tennessee in 1993. Pearl Chin, Note, *Payday Loans: The Case for Federal Legislation*, 2004 U. ILL. L. REV. 723, 726 (2004). Indeed, payday lending is "one of the fastest-growing sectors of the 'fringe banking' industry." *Id.* at 724. In fact, "there are now more payday loan offices in California than McDonald's and Burger King restaurants." PETERSON, *supra* note 1, at 17 (quoting Damian Paletta, *In Brief: Hawke Says Don't Overlook the 'Underbanked'*, AM. BANKER, Mar. 19, 2002, at 4). By one estimate, the industry may grow 600% in the next ten years. *Id.* at 18.

14. Chin, *supra* note 13, at 732-33.

15. Creola Johnson, *supra* note 1, at 5-6. These practices include charging exorbitantly high interest rates, failing to provide crucial information to borrowers about the loans, using loan rollovers which trap borrowers in debt, and employing abusive collection tactics. *Id.* at 25-26. One particularly harsh method of collection has been to bring criminal charges against customers for writing bad checks, or threatening to do so, although the lender knows when the check is written that the customer does not have enough money in his checking account to cover it. *See* PETERSON, *supra* note 1, at 16. Yet, it is important to note that many borrowers believe these businesses are an important service. Bertics, *supra* note 13, at 137. Payday loan borrowers believe that these companies have two essential advantages for them: (1) the loans can be arranged easily

The key practice used by these banks to provide payday loans at extremely high interest rates is called rent-a-bank, and involves out-of-state banks partnering with in-state lenders who take advantage of the legal cover provided by the bank's charter to avoid the usury laws of the states in which the lending occurs.¹⁶ However, a recent Eleventh Circuit case, *BankWest, Inc. v. Baker*,¹⁷ provides hope for these consumers by demonstrating how a correct reading of the preemptive power of federal banking law enables states to recover their vital role in protecting poor borrowers like Lisa Engelkins.¹⁸

Exploitative interest rates have not always been so accepted. Western civilization, particularly its religious and moral tradition, has long spoken out against interest rates that enable wealthy lenders to take advantage of poor borrowers needing consumption loans.¹⁹ These moral prohibitions eventually matured into legal prohibitions on usury lending.²⁰ For someone in Lisa's position, needing a small loan to make

and with minimal hassle; and (2) borrowers believe they have no other viable options. *Id.* An Assistant Attorney General in Colorado recently remarked, "[g]iven its unsavory ancestry, the significant potential for abuse, and the devastating consequences of such abuse, payday lending demands the strictest of regulation and closest of scrutiny." Paul Chessin, *Borrowing From Peter to Pay Paul: A Statistical Analysis of Colorado's Deferred Deposit Loan Act*, 83 DENV. U. L. REV. 387, 423 (2005).

16. Winebarger, *supra* note 6, at 320-21; *see infra* Part I.D.2.

17. *BankWest, Inc. v. Baker*, 411 F.3d 1289, 1293 (11th Cir. 2005), *vacated and appeal dismissed as moot*, 446 F.3d 1358 (11th Cir. 2006) (per curiam). Although the Eleventh Circuit vacated the initial *BankWest* opinion as moot because the plaintiff companies were no longer in the payday lending business, *BankWest*, 446 F.3d at 1362-63, 1368, the original opinion suggests a possible return to the traditional understanding of usury laws. *See infra* Part III.B.

18. *See infra* Part III.

19. *See, e.g.*, ZE'EV W. FALK, HEBREW LAW IN BIBLICAL TIMES 93 (2d ed. 2001) (describing that under Hebrew law, no interest could be taken on a loan to a fellow Hebrew); Maria Grazia Mara, *Usury*, in 2 ENCYCLOPEDIA OF THE EARLY CHURCH 856-57 (Angelo Di Berardino ed., Adrian Walford trans., 1992) (describing the writings of the early Church Fathers forbidding usury); THE OXFORD ILLUSTRATED HISTORY OF CHRISTIANITY 39 (John McManners ed., 1990) (showing the concerns of early Christian writers who prohibited usury, particularly on lending to the poor who mortgaged their homes). Later in history, moralists began to outline certain situations in which merchants could lend at interest, but high interest remained an ethical concern. *Id.* at 217; *see also* 1 FREDERICK POLLOCK & FREDERIC WILLIAM MAITLAND, THE HISTORY OF ENGLISH LAW 468 (2d ed. 1968) (explaining that in early common law, usury was considered immoral, and upon the death of a usurer, all of his chattels were forfeited to the King).

20. *See* 1 R.H. HELMHOLZ, THE OXFORD HISTORY OF THE LAWS OF ENGLAND 229 (2004) (noting that churches enforced the prohibition on usury within the ecclesiastical court system). Usury, however, was also considered a temporal crime, and laws passed by Parliament would bring usury cases into the Crown's courts as well, splitting jurisdiction over this crime. *Id.* at 379. The defining moral opinion on the subject of lending money at interest was that of Gratian, who, in his *Decretum*, defined usury as any loan made with an agreement to pay more than what had been lent. *Id.* at 378.

ends meet,²¹ there existed a great deal more legal protection in the year 1000 than there is today.²²

This Comment examines the usurious impact of the disappearance of the legal distinction between lending to the poor and commercial lending, and what the remedy might be, by first explaining the commercial lending purposes behind the National Bank Act that started this trend. Next, this Comment shows the purpose behind state usury laws, and how these laws fit into the traditional consumer protections provided by Western governments. Then, it explains how state usury laws have become nearly irrelevant as an unintended consequence of federal banking law. Finally, this Comment examines the recent decision in *BankWest, Inc. v. Baker* and shows how the Eleventh Circuit correctly interpreted the preemptive power of federal banking law so as to leave room for states to fulfill their historic role in protecting consumers from financial exploitation in the form of payday lending, while still respecting Congress' valid commercial purpose. This Comment recommends that (1) states use the preemption analysis of *BankWest* to enact stricter usury laws limiting the ability of payday lenders to engage in rent-a-bank practices, and (2) both the courts and the federal government return to an understanding of the dual nature of usury implicit in our federal system and recognize the tradition of borrower protection for consumption loans that is rooted in our anti-usury tradition.

I. THE UNINTENDED CONSEQUENCES OF FEDERAL BANKING POLICY FOR STATE CONSUMER PROTECTION LAWS

A. *The National Bank Act and Commercial Lending*

Acting to improve national commercial lending, Congress passed the National Bank Act (NBA) of 1863, which allowed national banks to charge "interest at the rate allowed by the laws of the State, Territory, or District where the bank is located," thus beginning the process of unintentionally undermining state consumer protections.²³ The intent

21. Lisa's story is disturbingly common. See Bruch, *supra* note 6, at 1257 (describing the story of Patrica Turner, who paid \$840 in eight months to pay for extensions on a \$405 loan without paying down the principal at all); Chin, *supra* note 13, at 723-24 (relating Pam Sanson's story, as she ended up paying \$900 in interest in six months on an original \$375 check); Bertics, *supra* note 13, at 133 (recounting Sandra Harris' story, as her dependence on payday loans led to the repossession of her car and wage garnishment).

22. See *infra* Part I.C.2.

23. 12 U.S.C. § 85 (2000). Later, 12 U.S.C. § 1831d(a) would serve the same purpose for state banks, allowing them to export their rates, equalizing the status of national and state banks regarding interest rates they could offer to out-of-state customers. *BankWest, Inc. v. Baker*, 324 F. Supp. 2d 1333, 1344 (N.D. Ga. 2004), *vacated and appeal dismissed as moot*, 446 F.3d 1358 (11th Cir. 2006) (per curiam).

behind the NBA was to protect national banks from discrimination by states that chartered their own banks, not to permit banks to evade the usury protections of the states.²⁴

This statute was a valid exercise of Congress' Commerce Clause power.²⁵ The NBA was specifically directed at national banks, allowing them to use the rates "allowed by the laws of the State . . . where the bank is located."²⁶ Thus, its intended area of effect was interstate commerce, the very area in which the Commerce Clause gave Congress the power to act.²⁷ The Commerce Clause was intended to "empower[] Congress to regulate commerce[, and therefore] the States necessarily surrendered any portion of their sovereignty that would stand in the way of such regulation."²⁸ By regulating the rates that banks could charge in interstate lending, Congress acted at the very core of its constitutional authority.²⁹

Congress' dual purpose in passing this statute was to help finance the Civil War and to allow nationally chartered banks to compete equally with state-chartered banks, not to interfere with state consumer protections.³⁰ Congress feared that if it could not ensure parity for national banks, it would cripple the ability of national banks to serve their purpose.³¹ However, the NBA ensured parity between state and

24. White, *supra* note 9, at 447; *see also* Federal Interest Rate Authority, *supra* note 11, at 60,025 (describing how the purpose behind the NBA was to prevent discrimination against national banks).

25. *See* U.S. CONST. art. I, § 8, cl. 3 (giving Congress the power "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes").

26. 12 U.S.C. § 85.

27. *See* *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 199-200 (1824).

28. *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 683 (1999) (quoting *Parden v. Terminal Ry. of Ala. State Docks Dep't*, 377 U.S. 184, 192 (1964)).

29. *See* *Schlesinger v. Gilhooly*, 81 N.E. 619, 624-25 (N.Y. 1907) ("Having the power to create national banks, it had the power to strengthen them by a general rule, operative in all the states, and to protect them from the varying policies of the different states with reference to the subject of usury, which otherwise might undermine their solvency and destroy their usefulness in certain localities.").

30. *See* *Roper v. Conserve, Inc.*, 578 F.2d 1106, 1115 n.9 (5th Cir. 1978), *aff'd sub nom.*, *Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326 (1980) (finding that the purpose of the NBA was "to place national banks on a plane of competitive equality with other lenders in respective states by adopting state law with respect to permissible interest rates"); White, *supra* note 9, at 450 (discussing the relationship between the NBA and Civil War financing).

31. *Schlesinger*, 81 N.E. at 625 (reasoning that if states could limit the interest rates of national banks more strictly than state banks, "[s]uch an act necessarily impairs the capacity of the bank to act in the ordinary course of business without great danger[:] [i]t hinders when there should be freedom, and destroys when there should be safety").

national banks, favoring neither in competition for loans.³² By creating this equality, Congress protected national banks from discrimination³³ and encouraged interstate lending,³⁴ just the sort of increased interstate commerce that motivated the Founders to give the interstate commerce power to the national government.³⁵ As Senator Sumner said during the debates on the NBA:

The financial enterprise that has been begun must be finished and protected If the system is to be maintained, if it is not to be utterly abandoned, it must be placed under the most favorable auspices, so at least that it may not fail from any want of care on our part For this reason I shall vote to keep it free from all State hostility or even State rivalry.³⁶

B. State Usury Protections for Consumption Borrowers

Most states still have usury laws that, at least theoretically, limit interest that lenders may charge on a payday loan.³⁷ Several states have no consumer protections for payday loans,³⁸ but the majority of states specifically allow payday lending with stated interest rate limitations, although those rates can be quite high or nonexistent.³⁹ On the other

32. First Nat'l Bank in Mena v. Nowlin, 509 F.2d 872, 879 (8th Cir. 1975) (discussing the legislative history of the statute). As the FDIC has recently recognized, under the NBA and its interpretation by the Supreme Court, "it has become well established that national banks are generally permitted to charge the highest interest rates permitted for any competing state lender by the laws of the state where the national bank is located." Federal Interest Rate Authority, *supra* note 11, at 60,026.

33. United Mo. Bank of Kansas City v. Danforth, 394 F. Supp. 774, 779 (W.D. Mo. 1975). Because of the National Bank Act, states could not give state banks any advantages over national banks. *Id.*

34. See, e.g., CONG. GLOBE, 38th Cong., 1st Sess. 2123-24 (1864) (discussing the possibility of creating more capital investment through standardizing interstate interest rates). As Senator Chandler remarked, the committee that proposed the bill "knew very well what they were preparing. They were preparing a national banking law." *Id.* at 2132.

35. See THE FEDERALIST NO. 22, at 123 (Alexander Hamilton) (Bantam Books 1982) (1787-88) (stating that "there is no object, either as it respects the interests of trade or finance that more strongly demands a Federal superintendence" than an interstate commerce power). Hamilton believed that different limits on trade in each state were a serious barrier to trade and the economic improvement of the United States. See *id.* at 123-24.

36. CONG. GLOBE, 38th Cong., 1st Sess. 2130 (1864).

37. White, *supra* note 9, at 445.

38. See JEAN ANN FOX, CONSUMER FED'N OF AM., UNSAFE AND UNSOUND: PAYDAY LENDERS HIDE BEHIND FDIC BANK CHARTERS TO PEDDLE USURY 30 (2004), <http://www.consumerfed.org/pdfs/pdrentabankreport.pdf> (naming New Mexico and Wisconsin).

39. See *id.* at 30 (naming Alabama, Arizona, California, Colorado, Delaware, Florida, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, North Dakota, Ohio,

hand, many states have tried to make payday lending illegal, often through interest rate limitations.⁴⁰ Thus, the vast majority of states provide some sort of interest rate-based limitation on these lending practices, even though some limits are very high.⁴¹

State usury limits provide a unique service to citizens of these states, limiting the terms of a contract between private parties with the intent of preventing interest rates that are per se too high.⁴² The purpose of these state statutes "is to protect those whom necessity compels to borrow against the outrageous demands oftentimes made and required by those who have money to loan."⁴³ If a contract is found to be usurious, a court may cancel⁴⁴ or void the loan.⁴⁵ Additionally, the court might enjoin the lender from enforcing the loan against the borrower,⁴⁶ or permit the borrower to recover the amount of usurious interest already paid in the course of the loan, possibly with punitive damages.⁴⁷ Thus, usury statutes serve an important consumer protection function, pursuant to the police power of the states, while also advancing significant public policy goals.⁴⁸

For example, the District of Columbia usury statute provides that "the parties to an instrument in writing for the payment of money at a future

Oklahoma, Oregon, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, Washington, Wyoming, and the District of Columbia).

40. See Creola Johnson, *supra* note 1, at 29; FOX, *supra* note 38, at 29 (naming as the jurisdictions that attempt to prohibit payday lending through rate limitations, usury laws, and specific restrictions on payday lenders: Alaska, Arkansas, Connecticut, Georgia, Maine, Maryland, Massachusetts, Michigan, New Jersey, New York, North Carolina, Pennsylvania, Rhode Island, Vermont, West Virginia, Puerto Rico, and the Virgin Islands).

41. See *supra* notes 39-40 and accompanying text.

42. See, e.g., *Fogie v. THORN Ams., Inc.*, 95 F.3d 645, 649 (8th Cir. 1996); *Hamilton v. York*, 987 F. Supp. 953, 955 (E.D. Ky. 1997) (order denying motion to dismiss) (stating that a usury claim requires the lender to knowingly charge an interest rate greater than permitted by statute); see also *Nichols v. Fearson*, 32 U.S. (7 Pet.) 103, 111 (1833) (stating that "acts against usury were intended to protect the needy").

43. *First Nat'l Bank of Ada v. Phares*, 174 P. 519, 520 (Okla. 1918) (per curiam).

44. See, e.g., *Hilal v. Lipton*, 642 N.Y.S.2d 78, 79 (N.Y. App. Div. 1996) (order granting motion for summary judgment) (applying equitable remedies to void a usurious contract).

45. See, e.g., *Focus Inv. Assocs. v. Am. Title Ins. Co.*, 992 F.2d 1231, 1240 (1st Cir. 1993) (stating that usury voids a contract under the applicable state law); *Tinter v. Sack*, 646 N.Y.S.2d 516, 517 (N.Y. App. Div. 1996) (order granting motion for summary judgment) (describing voidability if a contract was criminally usurious).

46. See, e.g., *Fogie*, 95 F.3d at 654.

47. See, e.g., *Bryson v. Bramlett*, 321 S.W.2d 555, 556-57 (Tenn. 1958).

48. See, e.g., *Fogie*, 95 F.3d at 654 (demonstrating the close connection between usury and consumer protection interest as part of a state's public policy); *Bynum v. Equitable Mortgage Group, No. 99 CV 2266-SBC-JMF*, 2005 U.S. Dist. LEXIS 6363, *2-3 (D.D.C. Apr. 7, 2005) (mem.) (demonstrating how closely usury statutes and consumer protection statutes are intertwined).

time may contract therein for the payment of interest on the principal amount thereof at a rate not exceeding 24% per annum,”⁴⁹ although loans of more than \$1,000 are exempt if they satisfy other conditions.⁵⁰ Through this statute, D.C. law protects small borrowers who need less than \$1,000, such as those seeking small consumption loans for a short period of time,⁵¹ by limiting the possible interest rate lenders may charge to a very low percentage compared to the national average for payday lending.⁵² This desire to protect debtors from otherwise legal, yet exploitative, contracts is also shown by D.C.’s limitation on interest in oral contracts to only 6% annually.⁵³ As implicitly recognized in the D.C. usury statute, this consumer protection role is an essential part of a state’s traditional authority to protect its citizens from overreaching by lenders.⁵⁴

49. D.C. CODE § 28-3301(a) (2001).

50. *Id.* § 28-3301(d)(1).

51. The average payday loan is for about \$300. Maureen Rooney, *Legal Loan Sharks*, CREDIT INFOCENTER, Feb. 2002, <http://www.creditinfocenter.com/loans/legalloanshark.shtml>.

52. See *supra* note 7 and accompanying text.

53. D.C. CODE § 28-3303(1).

54. See *BankWest, Inc. v. Baker*, 411 F.3d 1289, 1314 n.4 (11th Cir. 2005) (holding that “[u]sury laws are an exercise of the historic police powers of the states”), *vacated and appeal dismissed as moot*, 446 F.3d 1358 (11th Cir. 2006) (per curiam); *Varr v. Olimpia*, No. H021157, 2002 Cal. App. Unpub. LEXIS 6155, at *6 (Cal. Ct. App. July 1, 2002) (stating that “usury law is within the state’s historic police powers, an area of traditional state regulation”); see also *Lindquist v. Xerox Corp.*, 571 F. Supp. 470, 472 (D.V.I. 1983) (order granting motion to dismiss) (explaining how a legislature can limit the usury defense through an exercise of its police power); cf. *United States v. Fox*, 6 C.M.R. 533, 536 (C.M.A. 1952) (explaining how in the military, as in the states, usury is a valid exercise of the government’s police power).

*C. State Usury Laws Reflect the Traditional Consumer Protection Duties of Governments Apparent in Our Legal and Moral Tradition*⁵⁵

*1. Biblical and Early Christian Usury Precepts*⁵⁶

Usury laws, such as the current state laws discussed *supra*, are rooted in the morals of the Old Testament.⁵⁷ Under Hebrew law, a lender was expected to lend money as an act of charity rather than as an interest-producing investment.⁵⁸ The righteous in the Old Testament have a duty to protect and care for the poor and needy, not to profit from their

55. The analysis in this Comment is unusual, in that it takes seriously the understanding that our legal history, even before the common law, is relevant to the application of law today. Our own legal tradition has grown out of much of what came before it, thus, this Comment will examine current usury law in light of that history to demonstrate the moral heritage that we have lost. This approach is appropriate because there is nothing unique or extraordinary about the marketplace, such as the market for consumer loans, that prevents it from being critiqued on a theological basis. RAYMOND PLANT, *POLITICS, THEOLOGY AND HISTORY* 180 (2001). Theology, if taken seriously, applies not only to what is ecclesiastical or divine, but also to what is secular and concrete as well. See *id.* Indeed, to think that "markets can[] somehow be bracketed off from the moral realm and treated as autonomous entities" would be illogical to a religious person. See *id.* See generally PHILIP JENKINS, *THE NEXT CHRISTENDOM: THE COMING OF GLOBAL CHRISTIANITY* (2002) (demonstrating that the view that religion and morality are critical to all aspects of life has become even more common in much of the world as traditional religion becomes a more vibrant force in many countries). Religiously-based morality is relevant to the marketplace precisely because "[m]arkets raise basic questions about the nature of value, about the character of human goods and the nature of human motivation, and thus form part of a public world to which religious belief can address itself." PLANT, *supra*, at 193. Even today, the writing on consumer credit protection and usury law is infused with ideas of morality. See Paul B. Rasor, *Biblical Roots of Modern Consumer Credit Law*, 10 J. L. & RELIGION 157, 173 (1993-94).

56. Although this Comment is limited to a discussion of the Judeo-Christian tradition, out of which grew the common law tradition, it is important to note that the Hindu, Buddhist, and Islamic traditions have all been critical of usury. See Wayne A.M. Visser & Alastair McIntosh, *A Short Review of the Historical Critique of Usury*, reprinted in *HISTORY OF USURY PROHIBITION* (1998), available at http://www.alastairmcintosh.com/articles/1998_usury.htm.

57. See Rasor, *supra* note 55, at 158 (explaining that our current consumer credit laws reflect many of the same moral and religious concerns found in the Bible and its legal codes). Usury laws are also apparent in sources outside any particular religious tradition, as seen in laws from the Roman Republic around 340 B.C., which made any form of interest illegal. Visser & McIntosh, *supra* note 56.

58. FALK, *supra* note 19, at 93. However, while under strict Hebrew law no interest could be taken on a loan unless it was a loan made to a foreigner, as time passed, this provision was largely ignored. *Id.* If a loan was unpaid, on the other hand, it appears that a debtor could be seized to labor until the debt was paid off, or children could be given as payment; in any case, the creditor would have to release him in the seventh year. *Id.* at 93-95.

misfortune.⁵⁹ This is particularly evident in *Ezekiel*, in which the law against interest was interwoven with the laws of charity, purity, and religious duty for the Jewish people.⁶⁰

The policy regarding the moral nature of lending reflects one of the core concerns of Old Testament writings on usury: lending at interest was a practice motivated by greed that allowed wealthier lenders to amass greater wealth at the expense of oppressing the poor.⁶¹ *Leviticus*, in particular, reflects the concern that charging interest on a loan is hurtful to the poor, encouraging Hebrews to maintain their “kin [who] fall into difficulty” even though they cannot pay for it, and to take no interest on any assistance that they give to them;⁶² usury prohibitions were necessary

59. Rasor, *supra* note 55, at 164-65. Indeed, the regulations on lending in the Bible were “part of a larger group of . . . humanitarian laws which were intended to protect the most vulnerable classes of society, especially widows, orphans, aliens, and the poor, including debtors.” *Id.* at 164.

60. *Ezekiel* 18:5-9. *Ezekiel* says:

If a man is righteous and does what is lawful and right—if he does not eat upon the mountains or lift up his eyes to the idols of the house of Israel, does not defile his neighbor’s wife or approach a woman during her menstrual period, does not oppress anyone, but restores to the debtor his pledge, commits no robbery, gives his bread to the hungry and covers the naked with a garment, does not take advance or accrued interest, withholds his hand from iniquity, executes true justice between contending parties, follows my statutes, and is careful to observe my ordinances, acting faithfully—such a one is righteous; he shall surely live, says the Lord GOD.

Id.

61. T.F. Divine, *Usury*, in 14 NEW CATHOLIC ENCYCLOPEDIA 498 (1967). This teaching was in accord with that of ancient Greek philosophers, such as Plato, who saw usury as a form of class conflict that was dangerous to the state, and Aristotle who condemned the usurer as “guilty of injustice, pettiness, and illiberality.” *Id.* This philosophy is reflected in *Exodus*, which states: “If you lend money to my people, to the poor among you, you shall not deal with them as a creditor; you shall not exact interest from them.” *Exodus* 22:25. In this way, these prohibitions on usury focused on the plight of the debtor, toward whom the lender was called on to show compassion. Rasor, *supra* note 55, at 165.

62. *Leviticus* 25:36-41. *Leviticus* reads:

Do not take interest in advance or otherwise make a profit from [your kin], but fear your God; let them live with you. You shall not lend them your money at interest taken in advance, or provide them food at a profit. I am the LORD your God, who brought you out of the land of Egypt, to give you the land of Canaan, to be your God. If any who are dependent on you become so impoverished that they sell themselves to you, you shall not make them serve as slaves. They shall remain with you as hired or bound laborers. They shall serve with you until the year of the jubilee. Then they and their children with them shall be free from your authority; they shall go back to their own family and return to their ancestral property.

Leviticus 25:36-41. Both *Exodus* and *Leviticus* appear to apply only in cases of loans to the poor. Visser & McIntosh, *supra* note 56. These moral precepts are also confirmed in the Psalms, where the man who shall “abide in [the Lord’s] tent” is characterized, in part,

to protect the basic survival of the debtor.⁶³ As a whole, the Old Testament understanding of usury reflects a concern for the potential exploitation of the poor by the wealthy through usury,⁶⁴ primarily as a way of preventing poverty.⁶⁵

The New Testament does not contain the same explicit prohibitions on usury.⁶⁶ However, the early Church Fathers drew on Old Testament

as one "who do[es] not lend [his] money at interest," promising that "[h]e who do[es] these things shall never be moved." *Psalm* 15:1-5. These Jewish laws marked a major departure from general practices in the ancient world at that time, where interest rates of 20% to 50% were common. J.E. Hartley, *Debt*, in 1 THE INTERNATIONAL STANDARD BIBLE ENCYCLOPEDIA 905 (Geoffrey W. Bromiley ed., 1979). Yet, even in Old Testament Israel, indebtedness remained a recurring problem, and many prophets criticized the lending practices of the wealthy that often led to the enslavement of fellow Jews. *Id.* at 905-06. However, the law did allow lending at interest to foreigners. *Deuteronomy* 23:20. This allowance in *Deuteronomy* reads:

You shall not charge interest on loans to another Israelite, interest on money, interest on provisions, interest on anything that is lent. You may charge interest, but on loans to another Israelite, you may not charge interest, so that the LORD your God may bless you in all your undertakings in the land you are about to enter and possess.

Deuteronomy 23:19-20. This text extends the prohibition on usury to any sort of lending, not just to the poor, although transactions with non-Jews are exempted. Visser & McIntosh, *supra* note 56.

63. Rasor, *supra* note 55, at 190 (stating that Biblical usury laws protected the "debtor's basic necessities from . . . overreaching or advantage-taking" by lenders). The strong line that the scriptural authorities take against usury could reflect the fact that the biblical law was designed to operate in an agrarian society where commercial loans were effectively non-existent, leaving only loans made for consumption, which would have been sought only by the poor who needed money to avoid going hungry. Hartley, *supra* note 62, at 905.

64. See *Nehemiah* 5:1-13 (describing where the prophet condemns wealthy landowners who had taken mortgages on the fields, vineyards, and houses of poor Jews who had borrowed money in order to pay the tax that the King had levied on their lands). Nehemiah confronts the wealthy lenders for exacting interest from those who had borrowed, demanding that they "stop this taking of interest [and] [r]estore to them . . . their fields, their vineyards, their olive orchards, and their houses." *Nehemiah* 5:10-11. The practice of lending among Jews during the time of the Old Testament indicates that it was not widely punished as a matter of criminal law, but was instead primarily considered a moral shortcoming. Visser & McIntosh, *supra* note 56.

65. Hartley, *supra* note 62, at 905; Rasor, *supra* note 55, at 168. As one scholar has noted, the fundamental characteristic of Biblical usury principles was that the vulnerable should be protected from exploitation by lenders. *Id.* at 190.

66. Mara, *supra* note 19, at 856. But see *Matthew* 25:14-30 for the "Parable of the Talents," where the master condemns the servant who hid the talent he had been given, telling the servant he should have "invested my money with the bankers, and on my return I would have received what was my own with interest." This seems to indicate an acceptance of commercial lending and investment during the time of Jesus, but not lending for consumption. Compare *Luke* 19:23 (describing Jesus' parable about the servant who hid rather than investing the money his master had entrusted to him: "[w]hy then did you not put my money into the bank? Then when I returned, I could have collected it with

texts to argue that usury was not compatible with Christian life⁶⁷ or consistent with the Jewish tradition.⁶⁸ These early Christian theologians condemned usury as contrary to the Christian duty to love the poor because the real intent of the usurer is to take advantage of his neighbor, leaving him poorer than before.⁶⁹ In fact, Ambrose came close to a total condemnation of usury under all circumstances.⁷⁰ For these moralists,

interest.”), with Hartley, *supra* note 62, at 906 (describing the criticisms Jesus made of the Pharisees who used their positions to maximize their own wealth). Augustine, in interpreting the Old Testament prohibitions on usury, bridged the gap between the Old Testament and Christianity, comparing the Old Testament understanding of usury to a minor sin, which he claimed would be easy for the Christian to avoid because “people who are incapable of even [avoiding usurious transactions and other sins] are much less able to speak the truth in their hearts, to refrain from practicing deceit with their tongues, to profess the truth outwardly just as it is in their hearts.” SAINT AUGUSTINE, EXPOSITION OF PSALM 14, *reprinted in THE WORKS OF SAINT AUGUSTINE: A TRANSLATION FOR THE 21ST CENTURY* 179-80 (John E. Rotelle ed., Maria Boulding trans., 2000). The link between the old Jewish law and Christianity was also apparent in his preaching on the Psalms where he wrote: “How do we know God does not want it in this case? Because it is written elsewhere, *He has not put his money out to usury* [referring to *Psalm* 14(15)]. And I think that usurers themselves know how loathsome, how hateful and abominable the practice is.” SAINT AUGUSTINE, EXPOSITION 3 OF PSALM 36, *reprinted in THE WORKS OF SAINT AUGUSTINE: A TRANSLATION FOR THE 21ST CENTURY* 129, 133 (John E. Rotelle ed., Maria Boulding trans., 2000).

67. Cf. Hartley, *supra* note 62, at 906. The New Testament introduces a new theological concept relating to debt, namely that while it is permissible to lend at interest, the Christian “is now under obligation to the greater principle of mercy.” *Id.* He can lend at interest, but he has what is generally a more stringent limitation on his lending than in the Old Testament because he must lend justly, “follow[ing] just business practices within the existing economic system.” *Id.* There is a Christian duty of stewardship to all creation of being generous and merciful. *Id.*; see also *Luke* 16:1-9 (describing the parable of the prudent steward).

68. See Mara, *supra* note 19, at 856. This tradition was not always followed, and indeed, early Christian clergy lent money to Christian merchants, much the same way that pagan temples acted as banks. THE OXFORD ILLUSTRATED HISTORY OF CHRISTIANITY, *supra* note 19, at 39. The Council of Nicaea in 325 limited the permissible interest rate for these loans from clerics to merchants to 12% a year, much lower than the typical commercial rate. *Id.*

69. Mara, *supra* note 19, at 856. This belief is reflected in the writings of Commodian, Lactantius, and Hilary of Poitiers in particular. *Id.* Furthermore, practicing usury denies freedom to the poor. *Id.* at 857 (citing the writings of Basil). Gregory of Nyssa was particularly adamant, criticizing the usurer as a thief who increases the number of those living in poverty. *Id.*

70. See *id.* at 857 (citing Augustine’s writings *De Nabuthe*, *De Bono Mortis*, and *De Tobia*). This would be echoed by John Chrysostom, Jerome, Augustine, and Leo the Great. *Id.* Cyprian saw avoiding usury as one of the many varied duties of the Christian. CYPRIAN, TREATISE III: SCRIPTURE TESTIMONIES AGAINST THE JEWS, *reprinted in THE TREATISES OF CYPRIAN* 21, 67 (London, Oxford 1839). The command “[t]hat we must not take usury,” is inserted between the teaching “[t]hat it comes from our sin and deservings that we are troubled, and do not feel the help of God in all things,” and “[t]hat even enemies are to be beloved.” *Id.* at 67 paras. 47-49.

usury represented a contrast with the Christian duties of charity and mercy; usury was evil both in its origin and effect—greed leading to the exploitation of the poor.⁷¹

For early Christians, the benefit of usury law was its ability to protect the desperately poor from exploitation when they had nowhere else to go.⁷² In this moral tradition, usury was not an honest business transaction because the purpose of lending at interest was to take advantage of your neighbor.⁷³ Yet, this criticism of usury lending to the poor was distinguished from the general allowance of commercial lending by Christians, as early in Christian history, clerics could morally lend money to Christian merchants.⁷⁴

2. *Usury Regulation in the Middle Ages and at Early Common Law*

The moral condemnation of usury reached its peak in the later Middle Ages,⁷⁵ when the Church Councils of the twelfth, thirteenth, and

71. Divine, *supra* note 61, at 499. Gregory of Nyssa saw usury as a form of oppression of the poor, a sin against Christian justice and charity:

The destitute person is making supplication and is seated outside your door; in his need he seeks your wealth to bring relief. However, you do just the opposite and turn him into an adversary. You fail to assist him and free him from necessity while you indulge in personal wealth. Furthermore, you sow evils in this afflicted wretch, remove the clothes from his nakedness, cause him harm and heap one care and grief upon another. Whoever takes money from the practice of usury secures a pledge of poverty and brings harm upon his home through a superficial good deed.

CASIMIR MCCAMBLEY, *Against Those Who Practice Usury by Gregory of Nyssa*, 36 GREEK ORTHODOX THEOLOGICAL REVIEW 287 (1991). For Gregory of Nyssa, usury was a form of false charity where the wealthy pretends to lend to a man in need, but really does so only for his own material benefit: "Usury opts for a convenient form of destitution in order to have money as a constantly toiling slave. In this manner moneylending obtains what it has lent out." *Id.* at 296. He asks of the Christian, "[a]re you not aware that the need for a loan is a request for mercy cheerfully bestowed?" *Id.* at 298. Indeed, according to Saint Basil, the pain of the debtor is like the pain of a mother in childbirth "because of the anguish and distress which it is accustomed to produce in the souls of the borrowers." *Id.* at 289 (citation omitted).

72. Divine, *supra* note 61, at 498.

73. Mara, *supra* note 19, at 856.

74. THE OXFORD ILLUSTRATED HISTORY OF CHRISTIANITY, *supra* note 19, at 39.

75. See *id.* at 106-07 (describing the strict interpretation of usury prohibition during the time of Charlemagne when usury, particularly in the form of profiteering on corn during times of famine, was considered to be against the example set by King David and other Old Testament kings who believed they should protect the poor from abuse, including unnecessarily high prices). The people of Charlemagne's time believed that God would punish a society that permitted usury, possibly through famine. *Id.* The Capitulary of Thionville exemplifies this fear of divine punishment because of usury, stating:

When famine or plague occurs, men should not wait for our edict but should straightaway pray to God for his mercy; as to scarcity of food in this present year,

fourteenth centuries forbade the taking of usury by anyone.⁷⁶ The final triumph of anti-usury teaching would come when Pope Urban III interpreted *Luke* 6:35 to forbid usury altogether, proclaiming that the intention to benefit by the lending of money by itself was usurious.⁷⁷ Pope Urban III's teaching was an interpretation of the words of Christ himself, and became widely influential.⁷⁸

In the Middle Ages, this strict prohibition against usury was mainly a form of consumer credit protection because most people had no means to protect themselves from unpredictable events such as famine, war, or fire that could destroy their livelihood.⁷⁹ Usury laws attempted to respond to the economic insecurity brought about by the commercial revolution.⁸⁰ Yet, as time passed, commercial loans were usually not considered usurious, but instead were considered an investment, whereas

let each man help his own people as best he can, and not sell his corn at too high a price.

Id. at 107. The *Hadriana*, a collection of Church laws from this time, included a letter by Pope Leo the Great that forbade usury by clerics and considered it sinful for the laity, but the capitularies of Charlemagne took this even further, outlawing usury by anyone. JOHN T. NOONAN, JR., *THE SCHOLASTIC ANALYSIS OF USURY* 15 (1957).

76. Divine, *supra* note 61, at 499. The Second Lateran Council forbade all usury. NOONAN, *supra* note 75, at 18. The Synod of Pavia was the first council to proclaim a punishment of excommunication for usurers and require restitution. *Id.* at 16. The Third Lateran Council, in addition to excommunication, made manifest usurers ineligible for a Christian burial, and forbade churches from taking donations from them. *Id.* at 19. The development of usury teaching was gradual, from the early Church Councils that had forbidden usury only by clerics, to the ninth century when usury began to be prohibited to the laity as well. JOHN GILCHRIST, *THE CHURCH AND ECONOMIC ACTIVITY IN THE MIDDLE AGES* 63 (1969). Although those Fathers were writing in a time when the typical economic activity was subsistence farming, and because the European economy had not changed much between the Roman Empire and the medieval period, there was no economic impetus for a change in usury doctrine, and the theologians of the time held them in high regard. *Id.* at 62.

77. NOONAN, *supra* note 75, at 19-20. This section of the *Gospel of Luke* reads: If you lend money to those from whom you hope to receive, what credit is that to you? Even sinners lend to sinners, to receive as much again. But, love your enemies, do good, and lend, expecting nothing in return. Your reward will be great, and you will be children of the Most High; for he is kind to the ungrateful and the wicked. Be merciful, just as your Father is merciful.

Luke 6:34-36.

78. NOONAN, *supra* note 75, at 19-20. As Noonan shows, by the High Middle Ages, basic accepted principles on usury law included that "(1) Usury is whatever is demanded in return in a loan beyond the loaned good itself; (2) the taking of usury is a sin prohibited by the Old and New Testaments; (3) the very hope of a return beyond the good itself is sinful." *Id.* at 20.

79. GILCHRIST, *supra* note 76, at 63-64.

80. *Id.* at 64.

emergency loans to the poor, who represented a higher risk to lenders because of their insecurity, remained the focus of usury laws.⁸¹

This traditional moral understanding of usury would come to influence the formation of the common law tradition.⁸² In England, the strong prohibition of usury is apparent in that usurers were excommunicated *ipso facto*,⁸³ and were required to make restitution for their offense before the Church would lift this ban.⁸⁴ Yet, over time, the English law came to distinguish between high and low rates of interest; the Elizabethan usury laws only provided for punishment in cases where the interest rate exceeded 10%, effectively allowing interest rates of less than

81. *Id.* at 64-65. Thus, the poor were the primary focus of usury protections because they represented the highest risk, and therefore would suffer the highest rates, but because of their low economic condition, they could ill afford to do without the consumer credit protection that usury laws afforded. *Id.* at 63-65.

82. See THEODORE F. T. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 423 (4th ed. 1948) (demonstrating how the church tribunals held jurisdiction over usurers during the time of the early common law). Usury appears to have been considered in a class of moral issues in which the English church had a particular interest. 1 HELMHOLZ, *supra* note 20, at 229 ("Ecclesiastical jurisdiction between parties embraced instance litigation over marriage and divorce, succession at death, tithes and other ecclesiastical dues, defamation, breach of faith or perjury, rights to ecclesiastical property, usury, assaults on the clergy, and ecclesiastical pensions."). In fact, the ecclesiastical court records from the early common law period refer to usury as a crime. *Id.* at 600.

83. 1 HELMHOLZ, *supra* note 20, at 378. In England, usury was an economic offense that continued to be considered sinful, and a breach of Christian morality. See 1 POLLOCK & MAITLAND, *supra* note 19, at 130. The religious and moral nature of usury regulation is reflected in understanding the Jews' role in money lending in England, where they could lend money at interest. *Id.* at 468-71; see also *Leviticus* 25:35-36 (explaining how Jews were prohibited from taking interest on loans to fellow Jews); *Deuteronomy* 23:19-20 (explaining that it was acceptable to take interest on loans to non-Jews). This theological happenstance created a unique position for Jews in England, where they began to handle the monetary business of the King, who, in theory, owned everything that belonged to them. 1 POLLOCK & MAITLAND, *supra* note 19, at 468-69. This relationship led to some of the early English anti-Semitism, as one historian explains, perhaps reflecting some of the prejudices of his time:

[P]erhaps they would have been accused of crucifying children and occasionally massacred; but they would not have been so persistently hated as they were, had they not been made the engines of royal indigence. From the middle of the thirteenth century onwards the king was compelled to rob them of their privileges, to forbid them to hold land, to forbid them even to take interest. This last prohibition could not be carried into effect; there was little or nothing that the Jews could profitably do if they were cut off from lending money. Their expulsion in 1290 looks like the only possible solution of a difficult problem.

Id. at 471 (footnote omitted).

84. 1 HELMHOLZ, *supra* note 20, at 378. As a consequence of a successful prosecution a usurer was forced to pay back the part of a loan payment that was usurious. *Id.* at 618. An additional punishment was often in the form of a "penitential event" whereby a usurer was required to demonstrate public remorse for his actions. See *id.* at 589.

10%.⁸⁵ This reflected the actual practice of English courts, which had come to allow moderate interest rates.⁸⁶ However, even as some interest rates became acceptable, the courts paid little attention to commercial loans at interest, instead concerning themselves mainly with smaller loans, likely of the consumption type.⁸⁷ Undoubtedly, large commercial loans did occur,⁸⁸ but it appears that they were not a major concern of the legal authorities, most likely because they were investment-type loans, not the consumption loans that were the concern of the moral tradition.⁸⁹

3. *The Dual Nature of Usury*

By understanding the history of usury laws and their consumer protection purposes, it becomes apparent that usury is far more complex than the current simplistic definition given by many authorities.⁹⁰ Something has been lost between the traditional, dual-level understanding of usury and *Black's Law Dictionary*, which defines *all* usury as "the charging of an illegal rate of interest" or, alternatively, "[a]n illegally high rate of interest," making no distinction between commercial loans and consumption loans.⁹¹ This lack of understanding for the nuance of usury is also reflected more widely in our legal culture.⁹² Understanding this disconnect between our tradition and our

85. *Id.* at 381.

86. *Id.* Many lenders avoided the charge of usury through a number of legal subterfuges. *Id.* One method of avoiding usury laws was through a mortgage called a gage where the creditor received profits from the land for a period of time, but the profits from the land did not pay down the principal debt. 2 FREDERICK POLLOCK & FREDERIC WILLIAM MAITLAND, *THE HISTORY OF ENGLISH LAW* 119 (2d ed. 1996). Another common law development that served as a way of getting around the prohibition on usury was the term of years, in which the usurer paid a lump sum in return for the revenues from the land for a certain number of years. PLUCKNETT, *supra* note 82, at 541. In this situation, the term would be long enough for the usurer to turn a profit, but because it only involved selling a lease for a lump sum, the "termor" could escape a charge of usury. *Id.* Critics have characterized this as "a speculative arrangement . . . made between a grasping money-lender on the one hand, and on the other a man whose difficulties temporarily compel him to part with his patrimony." *Id.*

87. See 1 HELMHOLZ, *supra* note 20, at 381-82. For example, the largest loan attacked as usurious in the English courts was a little over £24. *Id.* at 381.

88. See *id.*

89. GILCHRIST, *supra* note 76, at 64-65.

90. See discussion *supra* Part I.C.1-2. As shown *supra*, a review of the history of usury laws, both their moral underpinnings and their legal and practical implementation, demonstrates that there has always been more than one understanding of usury: on the one hand, there was usury as applied to commercial loans between merchants or businessmen, and on the other hand, there was usury as applied to consumer loans for persons in emergency situations. *Id.*

91. BLACK'S LAW DICTIONARY 1543 (7th ed. 1999).

92. 45 AM. JUR. 2D *Interest and Usury* § 84 (1999) (laying out the four requirements of usury: (1) that there be a loan or forbearance of something valuable; (2) that there be

current understanding helps explain how the unintended flaws in the interaction between federal banking law and state usury efforts came about.⁹³

D. The Modern Trend in Interest-Rate Regulation⁹⁴

1. Marquette and the NBA's Consequences for State Usury Limits

The first evidence that the federal purpose behind the NBA had become distorted began in *Marquette National Bank of Minneapolis v. First of Omaha Service Corp.* as a dispute over credit card interest rates.⁹⁵ The Supreme Court was called on to decide "whether the National Bank Act . . . authorize[d] a national bank based in one State to charge its out-of-state credit-card customers an interest rate on unpaid balances allowed by its home State, when that rate is greater than that permitted by the State of the bank's nonresident customers."⁹⁶ Omaha Bank, the defendant, was a national bank with a Nebraska charter, and as part of its financial services, attempted to issue credit cards to Minnesota residents.⁹⁷ Because Omaha Bank operated under Nebraska law, it charged Nebraska interest rates, which were higher than the interest rates permitted under Minnesota law.⁹⁸ Marquette National Bank sued to have Omaha Bank prohibited from soliciting Minnesota customers for credit cards that used higher interest rates than were legal under Minnesota law.⁹⁹

an agreement that the full amount loaned will be repaid; (3) that the lender make more profit on the loan than is legal; and (4) that the lender have the intent to break the law). Nowhere in this definition is the historical distinction between consumption and commercial loans under usury laws acknowledged. *See id.*

93. *See discussion infra* Part I.D.

94. The conflict between the National Bank Act and consumer protections did not arise until more than a century after passage of the Act. Although the reasons for this are not clear, it may be due to the fact that interstate consumption lending would have been much harder before technological advances in the mid-twentieth century made credit cards and other types of consumer loans more widespread. *See White, supra* note 9, at 447.

95. *Marquette Nat'l Bank of Minneapolis v. First of Omaha Serv. Corp.*, 439 U.S. 299, 301 (1978); *see also White, supra* note 9, at 451.

96. *Marquette*, 439 U.S. at 301.

97. *Id.* at 301-02.

98. *Id.* at 302. Omaha Bank charged 18% interest on the first \$999.99 of an unpaid credit card balance, and 12% interest on any unpaid credit card balance of \$1,000 and above; such high interest rates would not have been permitted under Minnesota law, which set the APR on unpaid credit card balances at 12% for all amounts. *Id.*

99. *Id.* at 304. The state trial court granted partial summary judgment to the plaintiffs, holding that the Minnesota usury statutes were not preempted by 12 U.S.C. § 85, which allowed national banks to use the rates allowed in their home states for out-of-state customers. *Id.* at 306. The court, therefore, granted an injunction that would have

A unanimous Supreme Court found that Omaha Bank was a national bank for purposes of the statute, and therefore, “[t]he interest rate that Omaha Bank may charge in its [credit card] program is thus governed by federal law.”¹⁰⁰ Because § 85 of Title 12 U.S.C. permits a national bank to charge rates based on the laws of the state in which it is located, the Court determined that Omaha Bank was located in Nebraska for purposes of the statute.¹⁰¹ The Court reasoned that “Omaha Bank cannot be deprived of this location merely because it is extending credit to residents of a foreign State,” and it could therefore export Nebraska rates.¹⁰²

The Court rejected Marquette National Bank’s argument that Congress’ intent was to equalize competition between state and national banks,¹⁰³ and that with rate exportation, the “competitive equality now existing between state and national banks” would be upset.¹⁰⁴ Finally, in

prevented Omaha Bank from soliciting credit card customers in Minnesota to use a card that charged higher interest rates than were permitted by state law. *Id.* The Minnesota Supreme Court reversed the lower court’s decision, finding that the usury laws of Nebraska governed Omaha Bank’s actions under Eighth Circuit precedent. *Id.* at 306-07. The plaintiffs then petitioned the Supreme Court for a writ of certiorari. *Id.* at 307.

100. *Id.* at 308.

101. *Id.* at 308-10. The parties agreed that the bank itself was located in Nebraska, but disagreed as to whether the BankAmericard program was located in Nebraska, or whether it was located in Minnesota because it was soliciting residents there. *Id.* at 309-10.

102. *Id.* at 310. The Court drew an analogy to Minnesota residents traveling to Nebraska to take out a loan there, pointing out that no one would suggest that Minnesota usury laws would be applicable in such a case. *Id.* at 310-11.

103. *Id.* at 313.

104. *Id.* at 314. This exportation doctrine was closely followed in later cases, which applied the NBA to other bank charges, most importantly in *Smiley v. Citibank*, 517 U.S. 735, 737 (1996). In *Smiley*, the Supreme Court examined whether § 85 also permitted banks to charge late fees that were permissible in the bank’s home state, but not in the state where some of the bank’s customers were. *Id.* The Court held that late fees were covered, and that even though they were illegal in the state of the credit card user, the out-of-state bank was entitled to charge those fees because they were legal in the bank’s home state. *See id.* at 739-40, 747. In nearly every type of consumer loan transaction, courts have consistently followed this concept of rate exportation. *See, e.g., Cades v. H & R Block, Inc.*, 43 F.3d 869, 874-76 (4th Cir. 1994) (allowing a Delaware bank to lend money through a tax preparation company to a customer who agreed to sign over his income tax return and received his expected return minus an interest rate); *Basile v. H & R Block, Inc.*, 897 F. Supp. 194, 198-99 (E.D. Pa. 1995) (mem. order granting defendant’s motion for summary judgment) (permitting a tax return refund loan where both the tax preparation service and the bank headquarters were in Pennsylvania, but a subsidiary of the bank in Delaware actually made the loan in order to escape Pennsylvania’s usury limitations); *Wiseman v. State Bank & Trust*, 854 S.W.2d 725, 726-27 (Ark. 1993) (allowing a lender to escape Arkansas usury limits where Arkansas residents bought a car in Arkansas and were lent funds by an Arkansas bank through its subsidiary in Oklahoma, even though the limited contact with Oklahoma consisted of only a fax of the loan papers and a return phone call).

a crucial blow to the effectiveness of state interest rate protections, the Court dismissed *Marquette's* contention that rate exportation would undermine state usury laws, finding that such "impairment . . . has always been implicit in the structure of the National Bank Act."¹⁰⁵ The Court held that the protection of such laws "is an issue of legislative policy, and any plea to alter § 85 to further that end is better addressed to the wisdom of Congress than to the judgment of this Court."¹⁰⁶

Yet, instead of altering § 85, Congress passed the Depository Institutions Deregulation and Monetary Control Act, part of which became 12 U.S.C. § 1831d(a), to equalize the treatment of state banks.¹⁰⁷ States also significantly liberalized their usury laws, with some even going so far as to eliminate interest limits altogether.¹⁰⁸ This has created a landslide of deregulation, effectively abandoning consumer interest rate limitations, such that "all but a small part of consumer credit in every state will eventually be subject to unlimited rates that are imported from states with unlimited rates."¹⁰⁹

2. *Rent-a-Bank and the Use of Marquette by the Payday Industry*

Payday lenders have exploited *Marquette* and these federal statutes¹¹⁰ by affiliating with banks that are free from effective state usury

105. *Marquette*, 439 U.S. at 318.

106. *Id.* at 319. As the Court pointed out, statutory revisions could alter the usury regulatory framework set up by § 85 and *Marquette, id.*, but this did not happen in the way that consumer advocates might have preferred. Instead, Congress amended federal law to allow state banks to have the same exportation rights that national banks enjoyed under § 85, and many state laws were changed to allow in-state banks to compete more effectively with out-of-state banks. White, *supra* note 9, at 453; *see also supra* notes 37-41 and accompanying text.

107. *Sherman v. Citibank*, 640 A.2d 325, 328 (N.J. Super. Ct. App. Div. 1994), *rev'd*, 668 A.2d 1036 (N.J. 1995), *vacated*, 517 U.S. 1241 (1996). Section 1831d "essentially incorporated section 85 into the legislation governing federally-insured state banks, in order to achieve parity between state and national banks." *Id.* Under the new federal statute, state-chartered banks were free to export interest rates. *See Jessup v. Pulaski Bank*, 327 F.3d 682, 684-85 (8th Cir. 2003) (permitting Alabama bank to lend credit card through Arkansas branch to Texas borrower); *Aronson v. Capital One Fin. Corp.*, 125 F. Supp. 2d 142, 145-46 (W.D. Pa. 2000) (order granting defendant's motion for summary judgment) (allowing exportation of fees as well as interest by state bank); *Hunter v. Greenwood Trust Co.*, 856 F. Supp. 207, 213 n.4 (D.N.J. 1992).

108. White, *supra* note 9, at 454. The FDIC has also said that the purpose of 12 U.S.C. § 1831d was to prohibit discrimination against state banks, because the state banks would not be able to compete equally with national banks without an equivalent to § 85. Fed. Deposit Ins. Corp., Ltr. No. 92-47, [1992-1993 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 81,534 (July 8, 1992) [hereinafter FDIC Ltr. No. 92-47]; *see also* Federal Interest Rate Authority, *supra* note 11, at 60,026 (describing how this statute "rectif[ie]d" the imbalance that had been created" by *Marquette* in favor of national banks).

109. White, *supra* note 9, at 465; *see also supra* note 38-39 and accompanying text.

110. Federal Deposit Insurance Act § 27(a), 12 U.S.C. § 1831d(a) (2000).

regulations, allowing these lenders to use any interest rate that would be legal in the out-of-state bank's home state.¹¹¹ In these rent-a-bank arrangements, the out-of-state bank will make the loan and the in-state payday lenders will immediately purchase that loan—"[i]n effect, the lender has 'rented' the bank's name for purposes of making a legal loan."¹¹² The out-of-state bank underwrites the loan, while the payday lender generates the loan, collects the payment, and completes the paperwork.¹¹³ This allows the payday lender to charge any rate allowed in the partner bank's home state, completely protecting the payday lender from state usury laws, even though the payday lender does all of the work.¹¹⁴ This creates "a significant barrier to state regulation of

111. Winebarger, *supra* note 6, at 320-21. Through these rent-a-bank relationships, "payday lenders attached to even the most insignificant of federal banks remain free to charge whatever interest rates they choose." PETERSON, *supra* note 1, at 13.

112. Barr, *supra* note 6, at 151.

113. Creola Johnson, *supra* note 1, at 106. The payday lender and out-of-state bank then share the profits made from the loans. *Id.* As a result of modern technology, it often takes less than twenty minutes from loan application to payment, including time for the payday lender to transmit the necessary data to the out-of-state bank, and then to receive approval of the loan. Barr, *supra* note 6, at 151. Even if an in-state affiliated bank helps originate and close the loan, the out-of-state bank can use its home state's interest rate laws because the lender bank would be located in the state where it has its main office for the purposes of § 85. Office of the Comptroller of the Currency, Interpretive Ltr. No. 721, [1995-1996 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 81-036 (Mar. 6, 1996).

114. Bruch, *supra* note 6, at 1277. Federal regulators have confirmed this interpretation of § 85, even where the out-of-state bank itself has a branch in the state of the borrower, thereby allowing exportation. Office of the Comptroller of the Currency, Interpretive Ltr. No. 822, 1998 WL 126800, at *4 (Feb. 17, 1998). Thus, "an interstate national bank may charge interest permitted by the laws of its home state unless the loan is made . . . in a branch or branches of the bank in a single host state." *Id.* at *8. A number of states and plaintiffs have attempted to reign in the abuses of payday lenders that partnered with out-of-state banks to avoid usury laws by claiming that the in-state payday lender was actually the lender, rather than the out-of-state partner bank, and therefore the in-state payday lender would be subject to usury laws. See, e.g., *Goleta Nat'l Bank v. O'Donnell*, 239 F. Supp. 2d 745, 750 (S.D. Ohio 2002) (order granting defendant's motion to dismiss) (finding that a national bank did not have standing under § 85 to bring suit against a state seeking to adversely regulate an in-state payday lender that rented the national bank's charter); *Hudson v. Ace Cash Express, Inc.*, No. IP 01-1336-C H/S, 2002 WL 1205060, at *4, 7 (S.D. Ind. May 30, 2002) (order granting defendant's motion to dismiss) (finding preemption of an individual plaintiff's claims); *Goleta Nat'l Bank v. Lingerfelt*, 211 F. Supp. 2d 711, 717 (E.D.N.C. 2002) (order granting defendant's motion to dismiss) (agreeing to address the preemption issue in a case brought by a state). These claims have had mixed success in avoiding the preemption of federal banking law, mainly because it is difficult to prove that the in-state lender was making the loan and could be regulated under existing state usury laws. See *Hudson*, 2002 WL 1205060, at *7 (finding that the out-of-state bank made the loan, so the federal banking act preempted the state law usury claim); cf. *O'Donnell*, 239 F. Supp. 2d at 753 (holding that Ohio could regulate the in-state payday lender under state usury law if the state could show that the payday lender, and not the national bank, was making the loan, but again not deciding the factual

fringe market lending.”¹¹⁵ The protection provided by these arrangements is so complete that payday lenders have not tried to disguise the high cost of their services because with these charters, they have “unfettered discretion” to lend as they wish.¹¹⁶

3. Federal Regulatory Action Permits Rent-a-Bank

Federal regulators have begun to regulate payday lenders more closely, particularly rent-a-bank relationships;¹¹⁷ yet, because one major federal banking authority permits rent-a-bank agreements, the same practices continue.¹¹⁸ The Office of the Comptroller of the Currency (OCC) has been the most active federal agency in this area, driving all national banks out of rent-a-bank entirely.¹¹⁹ The OCC has recognized that the intent behind these partnerships between out-of-state national banks and in-state third-party lenders has been to avoid state consumer protections laws, particularly usury laws.¹²⁰ Another major concern for

issue of who was actually the lender); *Lingerfelt*, 211 F. Supp. 2d at 718 (holding that federal law would preempt only if it could be proven that the out-of-state bank, and not the payday lender, was actually making the loan, but not deciding the issue of the actual lender).

115. *Drysdale & Keest*, *supra* note 6, at 605. Federal banking authorities have supported this deregulated view of interest rate exportation, interpreting 12 U.S.C. § 1831d to give state-chartered banks “most favored lender” status, which allowed them to charge any interest rate permitted in their home state to borrowers in other states “even if that rate exceeds the maximum permitted by an out-of-state borrower’s state of residence.” FDIC Ltr. No. 92-47, *supra* note 108.

116. *Bruch*, *supra* note 6, at 1278 (2001); *see also* FDIC Ltr. No. 92-47, *supra* note 108 (interpreting 12 U.S.C. § 1831d to “authorize[] state-chartered banks insured by the Federal Deposit Insurance Corporation . . . to ‘export’ the same fees and charges on interstate loans that national banks can export under 12 U.S.C. § 85”).

117. *See* Office of the Comptroller of the Currency, Consumer Protection News: Payday Lending, <http://www.occ.gov/Consumer/payday.htm> (last visited Aug. 11, 2006) [hereinafter OCC Consumer Protection News]; Federal Deposit Insurance Corporation, Guidelines for Payday Lending, <http://www.fdic.gov/regulations/safety/payday> (last visited Aug. 11, 2006) [hereinafter FDIC Guidelines for Payday Lending].

118. *See* Letter from Jean Ann Fox, Dir. of Consumer Prot., Consumer Fed’n of Am., to Fed. Deposit Ins. Corp. 4-5 (Mar. 3, 2003), *available at* <http://www.consumerfed.org/pdfs/fdic030203.pdf> (regarding the 2003 draft guidelines on payday lending by FDIC-insured banks).

119. OCC Consumer Protection News, *supra* note 117 (“A handful of national banks essentially rented out their charters to third party payday lenders The OCC took a series of enforcement actions that eliminated these relationships from the national banking system.”).

120. Office of the Comptroller of the Currency, *Special Supervision and Enforcement Activities*, 22 O.J. 23, 29 (2003), *available at* <http://www.occ.gov/qj/qj22-3/qj22-3.pdf>; *see also* News Release, Office of the Comptroller of the Currency, Peoples National Bank to Pay \$175,000 Civil Money Penalty and End Payday Lending Relationship with Advance America (Jan. 31, 2003), <http://www.occ.gov/toolkit/newsrelease.aspx?doc=2bqxjoxbc.xml> (quoting the Comptroller of the Currency as “greatly concerned with arrangements in

the OCC has been that these partnerships create serious safety and soundness problems for the national banks involved.¹²¹ Because of these concerns, in 2003, the OCC ensured that “all national banks with known payday lending activities through third-party vendors were ordered to exit the payday lending business.”¹²²

The Federal Deposit Insurance Corporation (FDIC), on the other hand, has not driven federally insured state banks out of rent-a-bank practices, leading payday lenders to turn to state banks to ensure the continuance of their lending operations with the advantages of rent-a-bank.¹²³ The FDIC has issued guidelines on payday lending by federally insured state banks, but these guidelines specifically allow for partnerships with in-state lenders whereby the out-of-state bank exports its rates “regardless of usury limitations imposed by the state laws of the borrower’s residence.”¹²⁴ Thus, despite concerns over bank safety and

which national banks essentially rent out their charters to third parties who want to evade state and local consumer protection laws”); News Release, Office of the Comptroller of the Currency, OCC Concludes Case Against First National Bank in Brookings Involving Payday Lending, Unsafe Merchant Processing, and Deceptive Marketing of Credit Cards (Jan. 21, 2003), <http://www.occ.gov/toolkit/newsrelease.aspx?doc=c4gdhg41.xml> (stating that the Comptroller of the Currency believes the “underlying purpose of the relationship is to afford the vendor an escape from state and local laws that would otherwise apply to it”).

121. See, e.g., News Release, Office of the Comptroller of the Currency, OCC Takes Action Against ACE Cash Express, Inc. and Goleta National Bank (Oct. 29, 2002), <http://www.occ.gov/ftp/release/2002-85.txt>. For the Comptroller of the Currency, this represented an instance of “the risks national banks expose themselves to when they rent out their charters to third-party vendors and fail to exercise sound oversight.” *Id.*; see also News Release, Office of the Comptroller of the Currency, OCC Files Notice of Charges Against People’s National Bank of Paris, Texas (Mar. 18, 2002), <http://www.occ.gov/ftp/release/2002-26.txt> (stating that such “unsafe and unsound practices . . . are likely to weaken the condition of the bank and prejudice the interests of the bank’s depositors”).

122. Office of the Comptroller of the Currency, *supra* note 120, at 29.

123. Press Release, Consumer Fed’n of Am., Consumer Federation of America Applauds Comptroller Action to Halt Rent-A-Bank Payday Lending by Peoples National Bank of Paris, TX (Jan. 31, 2003), <http://www.consumerfed.org/releases/2.cfm?filename=013103OCCPeoplesaction.txt> (stating that because OCC has driven national banks out of the rent-a-bank market, payday lenders are instead using state banks). This is despite opposition from the majority of state governments, who have encouraged the FDIC to address rent-a-bank practices on the part of federally insured state banks. *States Want FDIC Crackdown on Payday Lenders*, CONSUMERAFFAIRS.COM, May 17, 2005, http://www.consumeraffairs.com/news04/2005/payday_ag.html [hereinafter *States Want FDIC Crackdown on Payday Lenders*]. The thirty-seven state attorneys general who sent a letter to the FDIC argued that “the FDIC has encouraged a cynical subversion of state laws on the part of the payday lending industry and has interfered with the states’ rights to apply and enforce our consumer protection and lending laws.” *Id.*

124. FDIC Guidelines for Payday Lending, *supra* note 117. The current guidelines for state banks in the payday lending market were revised in March 2005. Press Release, Fed.

soundness as well as compliance issues, the FDIC is willing to permit rent-a-bank as long as “effective risk controls are implemented.”¹²⁵ This has led payday lenders to partner with out-of-state state banks, rather than national banks, because of the differences in enforcement between the FDIC and the OCC, leaving consumers in effectively the same position.¹²⁶

4. *BankWest and the Eleventh Circuit’s Resurrection of State Usury Laws Through a New Analysis of Federal Preemption*

The state of Georgia had its own plans for reining in the unintended abuses of federal banking law, particularly attempts by lenders to disguise local payday transactions as loans from out-of-state banks to avoid state usury limits.¹²⁷ Georgia passed a statute requiring any lender that offered loans of up to \$3,000 to comply with state usury limits, but it exempted out-of-state banks.¹²⁸ The lenders specifically covered by the statute included “‘purported agent[s] [where] . . . the entire circumstances of the transaction show that the purported agent holds, acquires, or maintains a predominant economic interest in the revenues generated by the loan.’”¹²⁹ The Act provided for criminal punishment and serious civil penalties for violators.¹³⁰

Deposit Ins. Corp., FDIC Revises Payday Lending Guidance (Mar. 2, 2005), <http://www.fdic.gov/news/news/press/2005/pr1905.html>.

125. FDIC Guidelines for Payday Lending, *supra* note 117. The FDIC was concerned about risk management, strategic planning, and ensuring that “competent and qualified third party provider[s]” were used. *Id.* Additionally, the FDIC wanted to ensure that in these relationships, there was an appropriate written contract that met a variety of standards, as well as that the state bank’s management would devote “sufficient staff with the necessary expertise to oversee” the in-state lender. *Id.*

126. Letter from Jean Ann Fox, to Fed. Deposit Ins. Corp., *supra* note 118, at 4-5 (regarding the 2003 draft guidelines on payday lenders). Most state attorney generals believe that the recent 2005 revision to the payday lending regulations does not really deal with the problems presented by rent-a-bank. *States Want FDIC Crackdown on Payday Lenders*, *supra* note 123; *see also* FOX, *supra* note 38, at 19-20 (describing how OCC regulatory action has driven payday lenders to partner with FDIC-insured state banks).

127. *BankWest, Inc. v. Baker*, 324 F. Supp. 2d 1333, 1340-41 (N.D. Ga. 2004) (citing GA. CODE ANN. § 16-7-1(c) (2004)), *aff’d*, 411 F.3d 1289 (11th Cir. 2005), *vacated and appeal dismissed as moot*, 446 F.3d 1358 (11th Cir. 2006) (per curiam) (vacating the previous decision as moot because the plaintiffs withdrew from payday lending during the appeal).

128. *Id.* at 1341.

129. *Id.* (citing GA. CODE ANN. § 16-7-2(b)(4)).

130. *Id.* at 1342 (explaining how the civil penalties for violating this new statute included damages of triple the amount of any interest on such loans, and allowed for both state officials and private individuals to bring actions under the statute).

Because this statute would seriously hinder the rent-a-bank scheme under which Georgia lenders partnered with out-of-state banks,¹³¹ payday lenders and their partner banks based in South Dakota and Delaware brought suit in federal court to obtain an injunction preventing the operation of the new statute.¹³² However, the district court denied the motion,¹³³ holding that the statute was not preempted by federal banking law.¹³⁴

While recognizing that federal banking law, specifically 12 U.S.C. § 1831d,¹³⁵ preempted state law by allowing banks to export the interest rate laws of their home states to customers in another state,¹³⁶ the court found that federal law did not preempt all state action in the area of banking regulation, and that it would not be impossible for a business covered by the laws to comply with both the Georgia and federal statutes.¹³⁷ Furthermore, the court believed that the purpose of § 1831d was to equalize the treatment of state and national banks in the area of interest rate exportation, and the court held that the Georgia statute did not “stand as an obstacle to achieving this objective and is therefore not preempted.”¹³⁸

The Eleventh Circuit upheld the district court’s decision.¹³⁹ The judges looked closely at the issue of preemption,¹⁴⁰ but found that although “Georgia’s usury laws present a serious problem for the plaintiff payday

131. *Id.* at 1356-57.

132. *Id.* at 1338-39.

133. *Id.* at 1339.

134. *Id.* at 1351.

135. Section 1831d was part of the Depository Institutions Deregulation and Monetary Control Act of 1980, Pub. L. No. 96-221, § 521, 94 Stat. 132, 164-68.

136. *BankWest*, 324 F. Supp. 2d at 1344. 12 U.S.C. § 1831d(a) was a corollary to § 85, giving state banks the same protections as national banks. *Id.*

137. *Id.* at 1345 (holding that “the FDIA [Federal Deposit Insurance Act] was not intended to ‘occupy the field’ of state bank regulation”).

138. *Id.* at 1346. Crucial to the court were its findings that there was a “complete exemption” for out-of-state banks, and that such banks would be able to continue to make payday loans in Georgia as long as they either did the lending themselves or had an agent in Georgia that did not receive the majority of the economic benefits from the loans. *Id.* The court contended that there was no reason to believe that payday lenders would be unable to conduct a profitable business under conditions where they could not have the predominant interest in the revenue. *Id.* at 1347. For the district court, this meant that the Georgia statute avoided preemption because it was not aimed at the national and out-of-state banks that Congress was protecting through federal legislation, but rather the “non-bank entities that receive a predominant share of the revenues from payday loans but, in an effort to avoid Georgia’s usury laws, contract with out-of-state banks to play the role of the lender.” *Id.*

139. *BankWest, Inc. v. Baker*, 411 F.3d 1289, 1293 (11th Cir. 2005), *vacated and appeal dismissed as moot*, 446 F.3d 1358 (11th Cir. 2006) (per curiam).

140. *See id.* at 1292.

stores,”¹⁴¹ the new law was not preempted.¹⁴² The Eleventh Circuit acknowledged that under federal banking law, out-of-state banks were entitled to charge their home state interest rates,¹⁴³ but held that the statute in question was aimed only at in-state payday businesses.¹⁴⁴ The court examined the possibility of field preemption,¹⁴⁵ conflict preemption,¹⁴⁶ and express preemption.¹⁴⁷

The court quickly determined that there was no field or conflict preemption,¹⁴⁸ but the question of express preemption proved much trickier. To address this issue, the court broke down the relevant federal statute using a three-part test.¹⁴⁹ The court determined that the federal statute only expressly preempted state statutes that prevent a state bank from using the interest rates permitted in their home state on any loan.¹⁵⁰ The question for the court, then, was whether the state statute was attempting to regulate banks in this manner, or as the court stated, “whether the Act . . . is a prohibited interest-rate limitation on loans between BankWest and its borrowers or a permitted agency regulation on when non-bank payday stores operating in Georgia may properly serve as agents for out-of-state banks.”¹⁵¹

The court found that the statute was only a regulation of the agency relationship between the payday stores in Georgia and the out-of-state banks, and therefore was not preempted by federal law.¹⁵² The court justified its decision by noting that the law did not limit the interest rate that an out-of-state bank could charge in-state customers, and that there were many ways for out-of-state banks to pursue payday lending in Georgia.¹⁵³ Finally, the court contended that the federal banking law did not alter the permissible ways in which a state could regulate the in-state agents of out-of-state banks.¹⁵⁴ Therefore, there was no express

141. *Id.* at 1293. Georgia set a maximum APR of 16% for loans up to \$3,000, *id.*, but this maximum APR did not apply to banks chartered in other states, allowing such banks to charge interest, such as 400-500% APR, as permitted under the laws of their home states. *Id.* at 1296.

142. *Id.* at 1306.

143. *Id.* at 1296.

144. *Id.* at 1297.

145. *Id.* at 1301-02.

146. *Id.* at 1302-03.

147. *Id.* at 1303-09.

148. *Id.* at 1301-03.

149. *Id.* at 1304.

150. *Id.* at 1304-05.

151. *Id.* at 1305.

152. *Id.* at 1305-06.

153. *Id.* at 1306.

154. *Id.*

preemption of Georgia's authority to pass a statute that forced in-state payday loan companies who partnered with out-of-state banks to comply with in-state usury limitations, as long as "the payday store retains the predominate economic interest in the payday loan."¹⁵⁵

II. FEDERAL LAW PREEMPTION LEAVES ROOM FOR THE CONSUMER PROTECTION ROLE OF THE STATES IN PAYDAY LENDING

A. *There Is No Express Preemption of Georgia's Law*

In performing the preemption analysis that was crucial to determining whether § 1831d prevented Georgia from regulating the in-state payday lenders, the Eleventh Circuit followed the appropriate narrow interpretation of federal law, guided by Supreme Court precedent.¹⁵⁶ For the court, the only real question was express preemption, which it found did not exist.¹⁵⁷ The three-part test that the court of appeals used to determine whether there was express preemption of the Georgia statute explains precisely what the federal law preempted, and when applied to the Georgia statute, demonstrated that federal law did not preempt the new law.¹⁵⁸ According to the Eleventh Circuit, the "plain language" of the federal statute preempted state laws that prevent "[1] a State bank . . . [2] from charging interest at the rate allowed by the home State . . . [3] on any loan."¹⁵⁹ This was the limit of the federal law, as it did not apply to agreements between in-state lenders and out-of-state banks; in fact, the federal statute did not mention "in-state, non-bank agents or agents at all."¹⁶⁰

155. *Id.* The court also concluded that federal law did not preempt other aspects of the Georgia statute, including the ability to prosecute out-of-state banks for assisting in usurious loans, *id.* at 1307-08, and the ability of the state to void the contract and allow for civil damages. *Id.* at 1308-09. The court also rejected the dormant Commerce Clause claim, reasoning that "[i]t is undisputed that the Act makes no attempt to regulate the interest rate out-of-state banks can charge borrowers in Georgia," and that "the Act actually places fewer restrictions on out-of-state banks than it does on Georgia-based banks." *Id.* at 1310. A dissent by Judge Carnes, however, bitterly disputed the findings of the court, particularly the majority's holding as to the nature of the loan. *Id.* at 1312 (Carnes, J., dissenting). Judge Carnes asserted that because BankWest was making the loans, it was therefore "the true lender." *Id.* at 1313-14. For the dissent, this meant that BankWest qualified as an out-of-state bank making "any loan" under the terms of the statute, and thus a state law that attempted to restrict the interest rates charged was preempted. *Id.* at 1315-16.

156. *See* *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 542 (2001); *Fla. Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142 (1963).

157. *BankWest*, 411 F.3d at 1306.

158. *Id.* at 1304.

159. *Id.*

160. *Id.* The parties disputed the FDIC's position on this issue; however, the court found it unnecessary to decide which interpretation to follow, reasoning that under *Smiley*

This interpretation closely follows the rules of express preemption statutory interpretation set out by the Supreme Court, which encourage limiting express preemption to "the language of the statute"¹⁶¹ when interpreting federal law.¹⁶² In § 1831d, Congress did not demonstrate that it wanted to prevent states from regulating the in-state partners of out-of-state banks; it only wanted to prevent states from prohibiting out-of-state banks from lending money at rates permitted by the bank's home state.¹⁶³ Because the statute clearly identifies its purpose, it is preferable that the courts not go beyond that and find a wider field of preemption,¹⁶⁴ because "congressional purpose to displace local laws must be clearly manifested."¹⁶⁵

Congress' intent with this statute was not to preempt what Georgia was attempting to do, but rather to remove the disadvantage to state banks caused by *Marquette's* interpretation of § 85.¹⁶⁶ The narrow reading of § 1831d in *BankWest*, using the three-part test, preserves this intent, neither stretching it nor limiting it further than what Congress wanted.¹⁶⁷ In applying this three-part test to the Georgia statute, the *BankWest* court found that the statute did not prohibit a state bank from lending to Georgia residents at an interest rate that was legal in the out-

v. Citibank, 517 U.S. 735 (1996), it was not obligated to give deference to agency positions regarding preemption. *BankWest*, 411 F.3d at 1300. Under *Smiley v. Citibank*, no deference to the agency was necessary when the agency gave its opinion as to preemption, rather than a substantive interpretation of a statute. *Smiley*, 517 U.S. at 744.

161. *Lorillard Tobacco*, 533 U.S. at 542. The Supreme Court held that because the presumption is against preemption, statutes should be read narrowly to limit the preemptive effect on state police powers. *Id.* at 541-42; see also *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947) ("[W]e start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.").

162. *Fla. Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142 (1963) (arguing that "federal regulation of a field of commerce should not be deemed preemptive of state regulatory power in the absence of persuasive reasons—either that the nature of the regulated subject matter permits no other conclusion, or that the Congress has unmistakably so ordained"). Some case law suggests that it is permissible to read a wider intent into federal preemption, but there must be a reason to do so. See, e.g., *Freightliner Corp. v. Myrick*, 514 U.S. 280, 288 (1995). Regarding § 1831d, however, there seems to be no reason to read wider preemption into § 1831d than what Congress specifically intended to preempt.

163. See 12 U.S.C. § 1831d(a) (2000).

164. See *Lorillard Tobacco*, 533 U.S. at 542.

165. *California v. Zook*, 336 U.S. 725, 733 (1949). The Court's need for clear congressional intent to preempt state regulation in an area shows that the Court errs against preemption in the absence of "persuasive reasons evidencing congressional intent favoring preemption." 2 RONALD D. ROTUNDA & JOHN E. NOWAK, *TREATISE ON CONSTITUTIONAL LAW* § 12.4, at 217 (3d ed. 1999).

166. See *supra* note 107 and accompanying text.

167. See *supra* note 107 and accompanying text.

of-state bank's home state.¹⁶⁸ It was simply a question of whether the state was trying to do what the federal law had preempted (regulating out-of-state lenders who loaned to Georgia residents) or whether it was merely a regulation of agencies in Georgia,¹⁶⁹ which other cases had not addressed.¹⁷⁰ The court's analysis showed that Georgia's law was, in fact, a "permitted agency limitation."¹⁷¹

This narrow reading of the statute is preferable to the alternative, which defers completely to an expansive view of preemption,¹⁷² because it is more consistent with the standard preemption analysis, which favors a narrow reading.¹⁷³ As the Supreme Court stated in *Lorillard Tobacco Co. v. Reilly*, "'an express definition of the pre-emptive reach of a statute . . . supports a reasonable inference . . . that Congress did not intend to pre-empt other matters.'"¹⁷⁴ The state intent of § 1831d was "to prevent discrimination against State-chartered insured depository institutions."¹⁷⁵ Therefore, under *Lorillard*, a court should interpret federal law to do exactly what it states.¹⁷⁶ Section 1831d does not cover third-party lenders; on its face, it only preempts "any State constitution or statute" that seeks to prohibit out-of-state banks from charging their home-state interest,¹⁷⁷ not the rates that can be charged by in-state, non-bank partners. This is precisely the interpretation that the court gave to the statute,¹⁷⁸ guided by *Lorillard* and other preemption cases.¹⁷⁹

The main argument against the *BankWest* holding is that the decision is "so narrow that it effectively repeals the statute" because "the majority

168. *BankWest, Inc. v. Baker*, 411 F.3d 1289, 1305-06 (11th Cir. 2005), *vacated and appeal dismissed as moot*, 446 F.3d 1358 (11th Cir. 2006) (per curiam).

169. *Id.* at 1305.

170. *See, e.g., Krispin v. May Dep't Stores Co.*, 218 F.3d 919, 924 (8th Cir. 2000) (dealing with a private suit brought against an in-state lender under state usury laws and finding that such claims were preempted by the NBA).

171. *BankWest*, 411 F.3d at 1305-06.

172. *See* Petition for Rehearing *En Banc* at 8, *BankWest*, 411 F.3d 1289 (No. 04-12420) [hereinafter *Petition for Rehearing En Banc*].

173. *See* *New York v. FERC*, 535 U.S. 1, 17-18 (2002); *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 541-42 (2001).

174. *Lorillard Tobacco*, 533 U.S. at 541 (quoting *Freightliner Corp. v. Myrick*, 514 U.S. 280, 288 (1995)) (omissions in original); *see also* *Malone v. White Motor Corp.*, 435 U.S. 497, 505 (1978) (using the plain language of a federal statute that stated what the law did not preempt to determine the actual extent of preemption).

175. 12 U.S.C. § 1831d(a) (2000).

176. *See Lorillard Tobacco*, 533 U.S. at 541-42.

177. 12 U.S.C. § 1831d(a).

178. *BankWest, Inc. v. Baker*, 411 F.3d 1289, 1303-04 (11th Cir. 2005), *vacated and appeal dismissed as moot*, 446 F.3d 1358 (11th Cir. 2006) (per curiam).

179. *See, e.g., Cal. Div. of Labor Standards Enforcement v. Dillingham Constr.*, 519 U.S. 316, 325 (1997).

has clearly endorsed any and all state-law restrictions on state bank loans . . . so long as the restrictions do not *directly* limit the interest that may be charged.”¹⁸⁰ Yet, what these advocates do not see is that the federal statute in question *does not actually prohibit these limitations*.¹⁸¹ Instead, the statute prohibits discriminatory treatment against out-of-state banks, a topic not even relevant to *BankWest* because the Act is aimed only at in-state lenders.¹⁸² Congress’ non-discrimination preemption intent is unaffected.¹⁸³

Because Congress expressly discussed preemption in the statute, the Eleventh Circuit correctly refrained from inferring even wider preemption.¹⁸⁴ *BankWest*’s only hope was to request a much looser understanding of federal preemption,¹⁸⁵ but this was a weak argument because the statute states exactly what it intended to preempt.¹⁸⁶ As the maxim states, “*expressio unius est exclusio alterius*: Congress’ enactment of a provision defining the pre-emptive reach of a statute implies that matters beyond that reach are not pre-empted.”¹⁸⁷ By reading § 1831d narrowly and following the express preemptive intent of Congress written in the statute itself, the Eleventh Circuit came to a preemptive interpretation most consistent with Supreme Court precedent and congressional intent—“the ‘ultimate touchstone’ of preemption analysis.”¹⁸⁸

B. Congress’ Commercial Purpose Protected by BankWest

Even though the field preemption discussion in *BankWest* was cursory,¹⁸⁹ an examination of Congress’ purpose in passing the NBA

180. Petition for Rehearing *En Banc*, *supra* note 172, at 5, 7.

181. See 12 U.S.C. § 1831d(a).

182. See *BankWest*, 411 F.3d at 1305-06.

183. See *id.* at 1302.

184. *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 517 (1992) (noting that “[w]hen Congress has considered the issue of pre-emption and has included in the enacted legislation a provision explicitly addressing that issue,” a court should not read preemption more widely into the statute). The presumption against preemption has been widely followed. See, e.g., *N.H. Motor Transp. Ass’n v. Rowe*, 377 F. Supp. 2d 197, 206 (D. Me. 2005) (order granting motions for summary judgment); *Bronco Wine Co. v. Jolly*, 95 P.3d 422, 451-52 (Cal. 2004), *cert. denied*, 126 S. Ct. 1169 (2006).

185. Petition for Rehearing *En Banc*, *supra* note 172, at 4-6.

186. See 12 U.S.C. § 1831d(a).

187. *Cipollone*, 505 U.S. at 517.

188. *2 ROTUNDA & NOWAK*, *supra* note 165, § 12.4, at 216.

189. See *BankWest, Inc. v. Baker*, 411 F.3d 1289, 1301-02 (11th Cir. 2005), *vacated and appeal dismissed as moot*, 446 F.3d 1358 (11th Cir. 2006) (per curiam). Field preemption occurs where federal regulation of a particular field is so extensive that it appears to leave no room for state regulation of the same field. *Wis. Pub. Intervenor v. Mortier*, 501 U.S. 597, 605 (1991); *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 248 (1984) (holding that

shows that Congress intended to regulate only the commercial lending field, and did not intend to undermine the traditional usury protection role of the states,¹⁹⁰ which is an entirely separate field.¹⁹¹ Therefore, *BankWest*, in addition to following the correct express preemption analysis, also protected Congress' commercial purpose in passing both § 85 and § 1831d using its authority under the Commerce Clause: equalizing the status of national banks with that of state banks, thereby creating a more vigorous national economy.¹⁹² Congress' purpose of regulating commercial lending continues to be effective under *BankWest* because all banks are treated equally; there is no discrimination against any particular type of bank.¹⁹³ Advocates for payday lenders dispute this contention, asserting that the Eleventh Circuit used such a narrow preemption analysis "that it reintroduces the very discrimination against . . . state banks that Congress intended to eliminate."¹⁹⁴ In reality, Congress' real purpose is fulfilled under the Eleventh Circuit's interpretation because the regulation only applies directly to in-state lenders, not to banks at all.¹⁹⁵ *BankWest*'s preemption analysis will not undermine Congress' purpose by putting state banks at a competitive disadvantage compared to national banks, despite what *BankWest*'s supporters assert.¹⁹⁶ Even if *BankWest* is unable to engage in rent-a-bank, under current federal regulations, national banks cannot do so either.¹⁹⁷

state law could be preempted "[i]f Congress evidences an intent to occupy a given field" in which there was also state law).

190. See *supra* Part I.A.

191. See *supra* Part I.A-B. There is also an argument that the very language of the statutes in question shows that Congress never intended for high interest rates to become widely accepted, and, in fact, visualized a fairly low standard rate. See 12 U.S.C. § 1831d. The current language of § 85 states Congress' intent to set the maximum annual interest rate national banks could charge at 7% if no rate is otherwise set by state law. 12 U.S.C. § 85 (2000). Indeed, as one of the first cases to interpret § 85 showed, the 7% rate was the general default provision, the bright line chosen by Congress; higher percentages were only allowed where it was necessary to create competitive parity between national banks and state banks. *Tiffany v. Nat'l Bank of Mo.*, 85 U.S. (18 Wall.) 409, 411-12 (1874) (finding the NBA to be a critical enabling statute for national banks).

192. See *supra* Part I.A; see also CONG. GLOBE, 38th Cong., 1st Sess. 2130 (1864) (citing the ability of national banking to increase the flow of capital).

193. See *BankWest*, 411 F.3d at 1305-06.

194. Brief for the American Financial Services Ass'n as *Amicus Curiae* in Support of Petition for Rehearing *En Banc* at 3, *BankWest*, 411 F.3d 1289 (No. 04-12420) [hereinafter Brief for American Financial Services Ass'n].

195. See *BankWest*, 411 F.3d at 1305-06.

196. See Brief for American Financial Services Ass'n, *supra* note 194, at 4-5.

197. See *supra* Part I.D.3; cf. *BankWest*, 411 F.3d at 1302 (limiting only the in-state lender's ability to lend at any interest rate, not the right of the banks to do so themselves).

Furthermore, *BankWest* helps to remedy the major unintended consequence of Congress' passage of these statutes: the rent-a-bank schemes of payday lenders, who charge extremely high interest rates to those who can least afford them.¹⁹⁸ In liberalizing banking law, Congress never intended to hurt the poor, and the regulatory actions by the OCC and FDIC demonstrate that this purpose has never been read into the statute, even if these organizations have found the actions to be legally permissible.¹⁹⁹ Eliminating state regulation of consumption loans does not serve Congress' interstate commerce purpose, and instead eliminates the historical distinction between consumption loans and commercial loans apparent in the Western tradition and embodied in state usury protections.²⁰⁰

The narrow reading encompassed in the three-part test of *BankWest* is an appropriate way to read the federal statute, providing a straightforward method of achieving the goals of the federal law and allowing states to serve their crucial role in protecting their citizens from exploitative usury, two separate fields of regulation.²⁰¹ The court read the statute to only allow out-of-state banks to use interest rates permitted in their home states on any loan, no matter where it was made.²⁰² This reading allows states to regulate rent-a-bank relationships,²⁰³ which is the source of most of the interest rate abuse in payday lending.²⁰⁴ This interpretation refocuses federal banking law on Congress' real purpose—smoothing interstate commerce—rather than eliminating state consumer protections; additionally, this reading allows states to fulfill their historic and moral role in protecting consumers from commercial abuse.²⁰⁵

198. See *supra* notes 16-18 and accompanying text.

199. See *supra* Parts I.A, I.D.2-3.

200. See *supra* Parts I.A, I.C.

201. See CTR. FOR RESPONSIBLE LENDING, GEORGIA'S PAYDAY LAW UPHOLD 1, 2 (2005), http://www.responsiblelending.org/pdfs/GA_Bankwest_v_Baker.pdf (recommending that states follow the lead of Georgia by enacting similar regulations). The Eleventh Circuit's concentration on protecting the intent of Congress is appropriate. See, e.g., *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 541 (2001); *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992); *La. Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 368-69 (1986); see also *Hines v. Davidowitz*, 312 U.S. 52, 67-68 (1941) (holding that in preemption cases, it is important to determine if the "law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress").

202. *BankWest*, 411 F.3d at 1304.

203. *Id.* at 1305-06.

204. See *supra* Part I.D.2; notes 14-16 and accompanying text.

205. See *supra* Parts I.A, I.C. Because the purpose was to prevent discrimination against state banks by allowing them to export their rates, the federal law achieves this goal. See *BankWest*, 411 F.3d at 1306; see also *Beneficial Nat'l Bank v. Anderson*, 539 U.S. 1, 10 (2003) (finding that the National Bank Act completely preempted state usury claims against out-of-state national banks, but did not define any greater area of preemption).

an issue payday lending supporters completely ignore.²⁰⁶

C. A Balance of Federal and State Interest Favors No Preemption

While the *BankWest* court's discussion of conflict preemption was also limited,²⁰⁷ a balancing of the federal and state interests involved supports an inference that even if there were a conflict, the state interest in the case of payday lending should be paramount. Indeed, some authorities have suggested that there is an implicit balancing in preemption cases.²⁰⁸ This occurs most notably in *Florida Lime & Avocado Growers, Inc. v. Paul*, where the dissent suggested that a state regulation, because it protected only an economic interest and not a health interest, does not carry as much weight.²⁰⁹

The federal interest expressed in payday lending can only be economic efficiency: the ability of banks to partner with in-state lenders to more easily market their products to payday lending consumers. This produces a fairly large payday lending market that reaches many people.²¹⁰ However, the case for federal preemption is unpersuasive because under the terms of *BankWest*, while rent-a-bank arrangements would certainly suffer in states with laws like Georgia's,²¹¹ banks are still free to engage in payday lending themselves. Thus, there is no real danger that Congress' interest in competitive equality in banking will suffer.²¹² Banking

206. See, e.g., Brief for American Financial Services Ass'n, *supra* note 194; Petition for Rehearing *En Banc*, *supra* note 172.

207. See *BankWest*, 411 F.3d at 1302-03. Conflict preemption occurs "when it is impossible to comply with both federal and state law and when state law stands as an obstacle to achieving the objectives of the federal law." *Cliff v. Payco Gen. Am. Credits, Inc.*, 363 F.3d 1113, 1122 (11th Cir. 2004); see also *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 248 (1984) ("If Congress has not entirely displaced state regulation over the matter in question, state law is still pre-empted to the extent it actually conflicts with federal law, that is, when it is impossible to comply with both state and federal law . . .").

208. KATHLEEN M. SULLIVAN & GERALD GUNTHER, *CONSTITUTIONAL LAW* 330-31 (15th ed. 2004) (suggesting that there may be a balancing of state and national interests in preemption cases).

209. *Fla. Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 168-69 (1963) (White, J., dissenting) (stressing the different weight that the court should have afforded to health interests rather than economic interests); see also *Nixon v. Mo. Mun. League*, 541 U.S. 125, 147 n.6 (2004) (Stevens, J., dissenting) (stating that "preserving States' general regulatory authority" is one factor to consider when deciding a preemption dispute).

210. See *supra* note 6.

211. *BankWest*, 411 F.3d at 1317-18 (Carnes, J., dissenting) (explaining how the Georgia law severely restricts out-of-state banks that seek to engage in payday lending).

212. *Id.* at 1297-98 (majority opinion) (explaining the Georgia Act's exemptions for out-of-state banks).

equality, the means of creating economic efficiency, remains just as viable with or without this state regulation.²¹³

On the other hand, the state's interest in protecting its consumers from payday lenders who use rent-a-bank arrangements to circumvent usury laws is significant, because the interest rates alone produce a damaging effect on the individual consumer.²¹⁴ By discouraging rent-a-bank relationships, a state can reduce this exploitation because most banks determine that payday lending creates serious image problems for them, as shown by the OCC crackdown, making them unlikely to payday lend without a front company.²¹⁵ Thus, in light of the large number of consumers adversely affected by rent-a-bank payday lenders,²¹⁶ and the state police power interest in preventing usurious transactions,²¹⁷ there is a legitimate state interest implicated by Georgia-type regulation, and this state interest outweighs the limited federal interest.²¹⁸

D. The Potential Widespread Impact of BankWest in Allowing States to Regulate the Payday Lending Industry

If the test in *BankWest* becomes the standard used when evaluating express preemption under either FDIA section 27(a)²¹⁹ or the NBA,²²⁰ states can follow Georgia's lead in regulating the agency relationship between banks and payday lenders, eliminating rent-a-bank practices.²²¹ If more states were to enact similar laws, payday lenders would have reduced access to borrowers, and would be less able to offer such unfavorable interest rates on payday loans.²²² *BankWest*'s three-part test for preemption will allow states to do indirectly what they cannot do directly.²²³ Indeed, as one consumer protection group has acknowledged,

213. See *id.*

214. See *supra* notes 6-7 and accompanying text (describing the possible interest rates).

215. See *supra* notes 117-22 and accompanying text.

216. See *supra* note 6.

217. See *supra* note 48 and accompanying text.

218. See *supra* note 48 and accompanying text.

219. 12 U.S.C. § 1831d(a) (2000).

220. 12 U.S.C. § 85 (2000). This would only be relevant if the OCC allowed renewed payday lending by national banks. See *supra* Part I.D.3.

221. See CTR. FOR RESPONSIBLE LENDING, *supra* note 201, at 2.

222. See *BankWest, Inc. v. Baker*, 411 F.3d 1289, 1317 (11th Cir. 2005) (Carnes, J., dissenting) (arguing that the purpose of the Georgia legislature in regulating the agency relationship was to get at the banks themselves), *vacated and appeal dismissed as moot*, 446 F.3d 1358 (11th Cir. 2006) (per curiam). Georgia, under the preemption analysis, can regulate the in-state agents without fear of preemption, thereby regulating the out-of-state banks as well. *Id.* ("Controlling a corporation's agents controls the corporation, just as binding a man's arms and legs binds the man.")

223. See *id.*; see also *Marquette Nat'l Bank of Minneapolis v. First of Omaha Serv. Corp.*, 439 U.S. 299, 318-19 (1978) (recognizing that preventing states from applying their

“[t]his decision shows that effective regulation of payday lending companies can be achieved without attempting to regulate banks.”²²⁴

III. A TWO-PART SOLUTION TO THE PROBLEM OF PAYDAY LENDING

A. Embrace the Three-Part Test of BankWest

The first step toward reining in the abuses of payday lenders is for other states to follow Georgia’s lead and regulate rent-a-bank relationships by enacting similar statutes that only regulate in-state lenders and are not preempted by regulations on out-of-state banks.²²⁵ Together with widespread acceptance of the three-part preemption test developed in *BankWest*, this approach could greatly decrease the number of payday lenders who operate free of state usury limitations.²²⁶ Thus, as long as state legislatures passed statutes that avoided prohibiting any loan made by an out-of-state bank at a rate legal in that bank’s state, as the three-part test explains, it should not be preempted, and will allow states to reclaim some of the powers that they appeared to lose under *Marquette*, thereby reestablishing their traditional role of protecting poor borrowers.²²⁷

The primary advantage of this approach is its workability. Currently, it is politically impossible to get § 85 and similar state laws repealed,²²⁸ leaving any action that could limit rent-a-bank to the state legislatures and the courts.²²⁹ If Congress is unlikely to act, the states should follow Georgia’s example and the courts should follow the Eleventh Circuit’s lead, thereby taking at least a small step towards regulating payday lenders.²³⁰ It seems apparent that because of the NBA’s preemption of state usury laws, only state regulation of the administration of payday loans will provide a workable solution for states trying to rein in their abuses.²³¹

usury rates to out-of-state banks is the natural result of interest rate exportation). This may present a new way for states to regulate the payday lending industry, particularly if it is widely followed. CTR. FOR RESPONSIBLE LENDING, *supra* note 201, at 2.

224. CTR. FOR RESPONSIBLE LENDING, *supra* note 201, at 2.

225. See *supra* Part II.

226. See *BankWest*, 411 F.3d at 1317 (Carnes, J., dissenting).

227. See *supra* Parts I.C., II.

228. White, *supra* note 9, at 464.

229. See CTR. FOR RESPONSIBLE LENDING, *supra* note 201, at 2.

230. See *id.* Even though the Eleventh Circuit vacated the *BankWest* holding because of mootness, see *BankWest, Inc. v. Baker*, 466 F.3d 1358, 1368 (11th Cir. 2006) (*per curiam*), the holding still shows the reasonableness of the court’s position regarding preemption, and serves as a guide to later courts examining similar issues.

231. Winebarger, *supra* note 6, at 337. This is particularly true because the FDIC has refused to drive the state banks it regulates out of the rent-a-bank business, despite the

B. *The Need for a Return to Dual-Natured Usury*

As demonstrated above, usury was not historically the bland and uniform legal creation in existence today, but instead embraced a distinction between commercial and consumption lending.²³² Usury prohibitions were based primarily on a desire to protect the poor from wealthy lenders who might take advantage of their desperation by issuing consumption loans that impoverished the borrower.²³³ Thus, there was an understanding that such a transaction, in which the wealthy lender enriched himself through consumption loans, was morally reprehensible and should be illegal.²³⁴ However, loans between the wealthy, which were often income-generating, had no such moral baggage,²³⁵ and were ignored by the courts.²³⁶ A return to this jurisprudential distinction in our legal system would provide a permanent solution to the problem of payday lending because it would protect those who are the most exposed to the possibility of usurious interest rates.²³⁷

success of the OCC in that area. See *supra* Part I.D.3. There are those who suggest that we should reject all state usury laws and rely instead on bankruptcy and collection limitations as well as the borrowers' ability to evade debt as a way to protect borrowers because a national usury law is not politically feasible. White, *supra* note 9, at 466. However, if the three-part test of *BankWest* is widely followed, it will provide a non-federal way to protect payday loan borrowers. See *supra* text accompanying notes 127-30. Other solutions, such as relying on banks to fix the problems by providing payday loans themselves and thus using price competition to improve the consumer market, or by using different credit practices that have better terms than payday loans, including state employee salary advance loans, lines of credit through checks, and direct deposit advances, see Bertics, *supra* note 13, at 149-51, lack the immediacy of state statutory solutions. Depending on banks to enact new lending schemes is not likely to provide any relief in the near future because such practices would undoubtedly require a long time to implement, and there would be no guarantee that these services would ever become widely available. But see *id.* State regulation provides a more immediate and comprehensive solution, as shown by Georgia's actions. See *BankWest, Inc. v. Baker*, 411 F.3d 1289, 1296-99 (11th Cir. 2005), *vacated and appeal dismissed as moot*, 446 F.3d 1358 (11th Cir. 2006) (per curiam).

232. See *supra* Part I.C.

233. See GILCHRIST, *supra* note 76, at 63-64; 1 HELMHOLZ, *supra* note 20, at 381; Divine, *supra* note 61, at 498; Rasor, *supra* note 55, at 190.

234. See *supra* Part I.C.1.

235. See *supra* notes 74, 81, 87 and accompanying text.

236. See *supra* notes 85-89 and accompanying text.

237. Most of the alternatives to stricter state usury enforcement favored by other scholars do not provide the same workable solution that this change in the understanding of the tradition of usury would offer. Some scholars have suggested: that the federal government pass legislation that sets limits on the APR of every kind of consumer personal loan, see Bruch, *supra* note 6, at 1286; that federal legislation outlaw various predatory practices, see Creola Johnson, *supra* note 1, at 116 (recommending federal legislation to limit fees on payday loans, to outlaw rent-a-bank, to outlaw rollovers, to outlaw criminal prosecutions for bad checks, and to demand proper notice for essential contractual provisions); or that the government provide incentives to increase the supply

As *BankWest* demonstrates, federal banking law does not preempt all state usury protections.²³⁸ This understanding needs to be more widely embraced at all levels of the legal system, through both the common law and statutes. The easiest method would be for Congress to enact laws that express an understanding that out-of-state banks should be unregulated, and thus free from usury laws, when lending commercially, but that out-of-state banks should be subject to state usury limitations when dealing in consumption loans.²³⁹ This would serve the dual purpose of furthering Congress' interstate commerce interest and rehabilitating the consumer protection role of the states.²⁴⁰ Additionally, courts should interpret usury laws with an understanding of the dual nature of usury, applying them strictly to consumption-type loans while exempting commercial loans from their review in accordance with congressional intent.²⁴¹ Perhaps if this understanding reemerges in our legal system, interpretations of federal statutes will come to reflect it as well, undoing some of the unintentional damage done by federal banking law.²⁴²

of standard banking services to the poor. See Barr, *supra* note 6, at 128. These solutions are unworkable precisely because they would require a major shift in congressional policy, which remains a nebulous hope at this time. See *supra* text accompanying note 228. The recommendation of having national bank regulators closely supervise out-of-state bank partnerships to ensure that the required disclosures are made and consumer protections are in place, see Michael S. Barr, *Access to Financial Services in the 21st Century: Five Opportunities for the Bush Administration and the 107th Congress*, 16 NOTRE DAME J.L. ETHICS & PUB. POL'Y 447, 461-62 (2002), would not solve the problem where all the necessary disclosures are made and the required protections are in operation but the terms of the payday loan contract itself are patently exploitative. Only the suggestion that substantive unconscionability standards be codified in state statutes for use by borrowers against payday lenders, see Steven W. Bender, *Rate Regulation at the Crossroads of Usury and Unconscionability: The Case for Regulating Abusive Commercial and Consumer Interest Rates Under the Unconscionability Standard*, 31 HOUS. L. REV. 721, 764-66 (1994), seems workable, but it is not clear how such a change would escape preemption under *Marquette* and the National Bank Act without a change in the basic understanding of usury law and interest rate regulation.

238. See *supra* Part II.

239. Here, a bright-line rule would prove useful, perhaps making all loans under \$1,000 for less than one year's duration subject to state usury laws in the state of the borrower.

240. See *supra* Part I.A-B.

241. This solution is more realistic because of the likely inaction of Congress. See White, *supra* note 9, at 464.

242. A return to strict usury limitations on consumption loans would have a number of benefits, particularly a reduction in consumer indebtedness. See Robin A. Morris, *Consumer Debt and Usury: A New Rationale for Usury*, 15 PEPP. L. REV. 151, 171 (1988). The deregulation of banking and consumer credit industries has created more competition, leading these institutions to expand the amount of credit they issue "and may be the single most influential factor leading to problematic debt in our society today." *Id.* at 169. Usury laws help resolve this situation by controlling the volume of credit available, pushing back against market forces that act to expand the amount of credit. *Id.* at 158.

IV. CONCLUSION

It should be a national embarrassment that poor borrowers who need a short-term loan to put food on the table had more consumer protections during the Middle Ages than they have under the current system of banking deregulation.²⁴³ We have neglected thousands of years of usury tradition, under which governments and moral leaders protected the poor from wealthy lenders through strict interest rate limitations on consumption loans.²⁴⁴ Only by reclaiming an understanding of the dual nature of usury laws, and following the preemption analysis of *BankWest*, can it be ensured that Congress' commercial goals are protected *along* with the usury role of the states.²⁴⁵

The unintentional consequences of federal banking policy for poor consumers are not without a cure. The abuses of payday lending will disappear if courts and legislatures return to a system of usury that is both traditional and radically new—regulating consumption loans to the poor and exempting investment-oriented commercial lending.²⁴⁶

State usury laws that restrict the availability of credit also help reduce problematic debt by aiding uninformed borrowers, incapacitated borrowers, borrowers who are high risk, and others. *Id.* at 171. Additionally, even though usury laws discourage competition, the companies that usury laws prevent from entering the marketplace are those who would seek to exploit borrowers, and thus consumer protection increases. *See* Drysdale & Keest, *supra* note 6, at 663. Furthermore, from an economic perspective, usury laws help counterbalance the risky behavior that providing welfare in a free market system creates by discouraging people from taking unwise risks. *See* Eric A. Posner, *Contract Law in the Welfare State: A Defense of the Unconscionability Doctrine, Usury Laws, and Related Limitations on the Freedom to Contract*, 24 J. LEGAL STUD. 283, 285 (1995). Some restrictions on the free market are an appropriate way of dealing with the risk-taking incentives of a welfare system. *Id.* at 286. As Posner explains:

Because welfare opportunism and welfare circumvention take the form of high-risk credit activity, the state should enact laws that restrict such activity. Restrictive contract doctrines, such as usury laws, perform this function. By allowing debtors to escape from high-interest credit contracts, they force creditors to withdraw such contracts from the market, denying the debtors the opportunity to obtain high-risk credit in the first place.

Id. at 286-87.

243. *See supra* Parts I.C.2, I.D.2.

244. *See supra* Part I.C.

245. *See supra* Parts I.A-B, I.C.3, II.

246. *See supra* Part III.B.